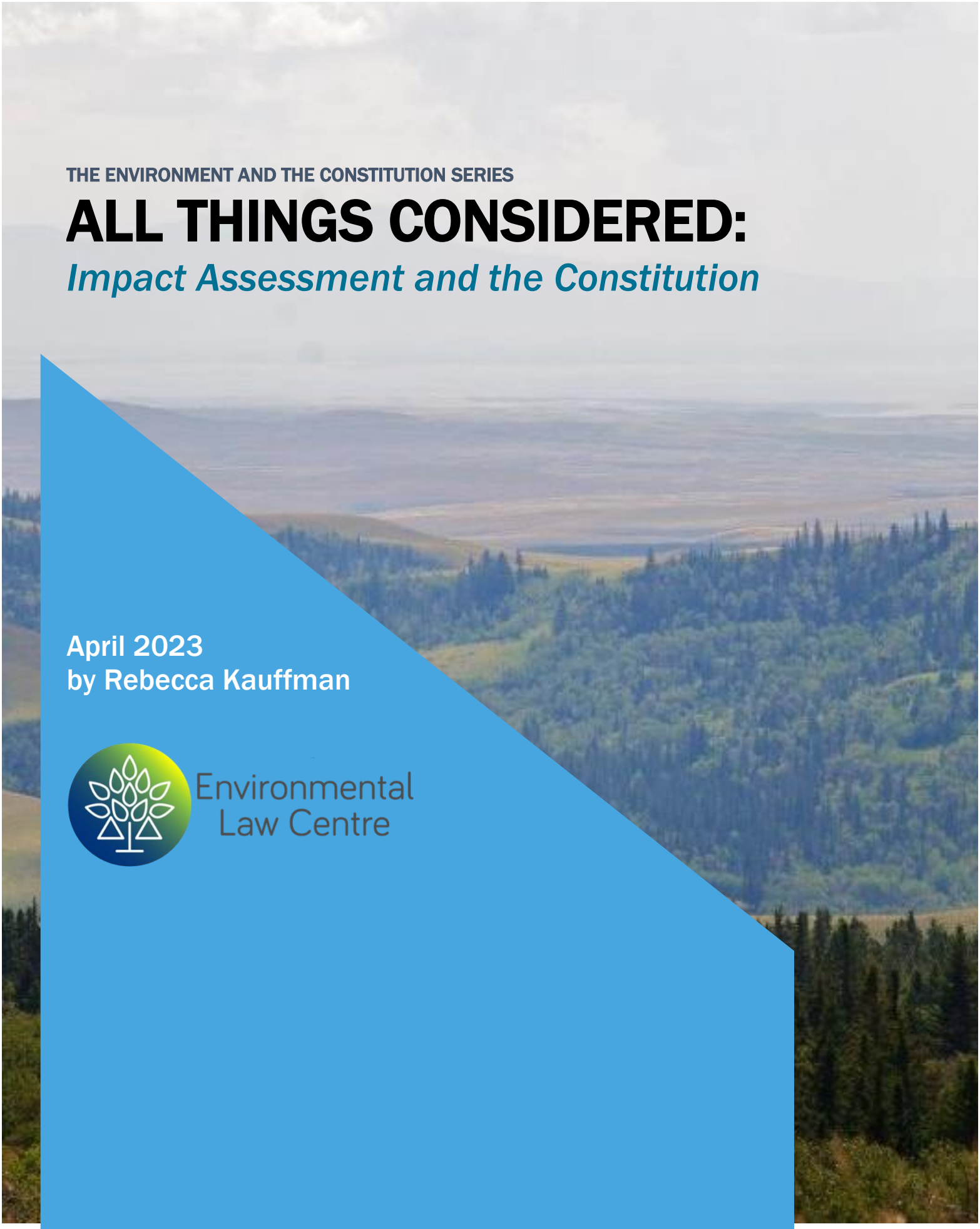

THE ENVIRONMENT AND THE CONSTITUTION SERIES

ALL THINGS CONSIDERED:

Impact Assessment and the Constitution

April 2023

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IMPACT ASSESSMENT & THE CONSTITUTION

Impact (or environmental) assessment is, at its most simple, an assessment process which considers the impacts and benefits of a proposed project. The outcome of such an assessment may result in a project approval, in conditions on a future approval, or in a refusal.

As Arlene Kwasniak put it, [impact] assessment is "a cornerstone of sustainable development."[1] She defines it more as a process by which "regulators identify and assess the environmental, social, and economic consequences of proposed projects" to decide whether the project should be approved, and if so, under which conditions.[2] At the federal level, the primary impact assessment legislation is the *Impact Assessment Act* – the 4th in a series of federal impact assessment laws over the decades.[3] At the provincial level, the *Environmental Protection and Enhancement Act* is the legislation responsible for impact assessment in Alberta.[4]

The balance of federal-provincial constitutional authority over impact assessment is in front of the Supreme Court of Canada, as of writing. In May 2022, the Alberta Court of Appeal released

[1] Arlene Kwasniak, "The Eviscerating of Federal Environmental Assessment in Canada" (31 Mar 2009) *ABlawg* online: http://ablawg.ca/2009/03/31/the-eviscerating-of-federal-environmental-assessment-in-canada/.
[2] *Ibid.*
[3] *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA].
[4] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA].

their decision in *Reference re Impact Assessment Act* in which the majority of that Court advised that the federal *Impact Assessment Act* was *ultra vires* federal jurisdiction.[5] Immediately after the release of this opinion, the federal government announced they would be appealing the Court of Appeal's opinion to the Supreme Court of Canada. It was heard over two days on March 21 and 22, 2023. While the Supreme Court's decision will likely take months to be released, we will be considering the ABCA decision and all past jurisprudence in light of the federal and provincial impact assessment laws. To begin, we will summarize the history of federal impact assessment law up to and including the *Impact Assessment Act*.

> A note on language: The most recent federal assessment law is the *Impact Assessment Act*; however, prior to this statute, legislation at the federal level referred to these assessments as 'environmental assessment.' In this report we will primarily use the current term 'impact assessment;' however, when quoting caselaw or academic research we may also use 'environmental assessment.' Generally, these terms will be considered interchangeable.

Impact Assessment in the Constitution

The *Constitution Act, 1867* does not refer specifically to impact assessment. Instead, the jurisdiction to conduct an assessment is often reliant on whether the project affects interests that otherwise fall under the relevant head of power. For federal interests, this may look like impacts on navigable waters, fisheries, migratory birds or interprovincial matters.[6] At the provincial level, this may look like impacts on public lands, local works and undertakings or impacts on their natural resource powers under section 92A.[7] We will consider both the federal and provincial jurisdiction in turn.

Federal Impact Assessment Legislation Over the Years

The following section will describe federal impact assessment law over the decades beginning with the first iteration, the *Environmental Assessment & Review Process Guidelines Order* up to the current *Impact Assessment Act.*[8] We provide this review primarily in order to situate ongoing

[5] *Reference re Impact Assessment Act*, 2022 ABCA 165 [Reference re IAA].
[6] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 91(10), (12), (29), s 92(10)(a) - (c) [Constitution Act] & *Migratory Birds Convention Act, 1994,* SC 1994, c 22.
[7] Constitution Act, *supra* note 6 at ss 92(5), (10) & 92A.
[8] *Environmental Assessment & Review Process Guidelines Order,* SOR/84-467 & IAA, *supra* note 3.

legislation over the jurisdiction to conduct impact assessment. Following a brief explanation of each statute, we will highlight some of the important caselaw that followed.

Environmental Assessment & Review Process Guidelines Order

The first iteration of an impact assessment law at the federal level was the *Environmental Assessment & Review Process Guidelines Order* ("EARPGO").[9] This was the formalization of a cabinet policy from the 1970s and was originally regarded as a "discretionary, non-binding process for federal decision-making."[10] However, as Brenda Heelan Powell points out, this interpretation did not last long, as the Supreme Court of Canada in the *Oldman River* decision (discussed below) determined shortly thereafter that the EARPGO "was applicable whenever the federal government had an affirmative regulatory duty related to a proposed initiative, undertaking, or activity."[11] From the beginning, the federal government was also clear that environmental assessment, including under the EARPGO, was a planning process, rather than a regulatory one.[12]

Under the EARPGO, the environmental assessment and review process was triggered when "a department intends to undertake any proposal on its own or has the authority to make a decision about a proposal of another organization that might have an environmental effect on an area of federal government responsibility, would require federal government financial commitment, or would be undertaken on lands administered by the federal government, including the offshore."[13] Once triggered, the process began with an initial assessment to determine whether the proposal had any potential adverse environmental effects.[14] After the initial assessment was complete, four options became available:

1. an automatic exclusion from further study, available if it was determined that the proposal would not have any potential adverse environmental effects;
2. an automatic referral for further assessment which applied to those proposals that could produce significant adverse environmental effects;[15]

[9] *Ibid.*
[10] Brenda Heelan Powell, "Environmental Assessment & the Canadian Constitution: Substitution and Equivalency" (2014) *Environmental Law Centre* at 9 [Heelan Powell].
[11] *Ibid* at 9.
[12] Federal Environmental Assessment Review Office, "The Federal Environmental Assessment and Review Process" (1987) *Minister of Supply and Services Canada* at 2 online: https://publications.gc.ca/collections/collection_2017/acee-ceaa/En106-4-1987-eng.pdf.
[13] *Ibid* at 2.
[14] *Ibid* at 2.
[15] *Ibid* at 2.

3. if potential effects of the proposal were determined to be significant, the proposal could be referred to a public review by an environmental assessment panel;[16] and finally
4. if none of these steps are triggered, the proposal could be abandoned or referred for public review.

While no longer in force, the constitutionality of this law was upheld by the Supreme Court of Canada ("SCC") in their decision *Friends of the Oldman River Society v Canada*, described below. Further, this decision remains applicable to impact assessment law today.

Friends of the Oldman River Society v Canada

In *Friends of the Oldman River Society v Canada* ("Oldman River"), the SCC upheld the EARPGO as constitutional and it has since remained the seminal decision on the jurisdiction to conduct impact assessment.[17] The facts of this case began after the Oldman River Society sought to compel the federal Departments of Transport and Fisheries and Oceans to conduct a public environmental assessment pursuant to the EARPGO in respect of a dam approved for the Oldman River in Alberta.[18] There were a number of issues before the SCC; however, for our purposes, the constitutional question is the most relevant. This question asked: "Is the *Guidelines Order* so broad as to offend ss 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by Alberta?"[19] We look at the Court's analysis below. The Court begins by stating that if the *Guidelines Order* ("EARPGO") is "found to be legislation that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction, that is the end of the matter [and i]t would be immaterial that it also affects matters of property and civil rights."[20] Thus, they begin with such an analysis, defining the pith and substance as "the dominant or most important characteristic of the challenged law."[21]

The majority acknowledged that the environment is not assigned to either level of government and due to the diffuse nature of the environment, "it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns" of a project.[22] To illustrate this point, they use the example of a rail line. Railways are assigned to the federal government; however, when making a decision about the approval of a new line, Parliament would need to consider many other factors such as the potential for environmental hazards from a derailment or the economic benefit of a new line to a town or city.[23] The environmental assessment process may properly fall under federal

[16] *Ibid* at 3.
[17] *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3 [Oldman River].
[18] *Ibid* at 18.
[19] *Ibid* at 32-33.
[20] *Ibid* at 62 citing *Whitbread v Walley,* [1990] 3 SCR 1273 at 1286.
[21] *Ibid* at 62.
[22] *Ibid* at 66.
[23] *Ibid* at 66.

jurisdiction so long as the "exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power."[24]

The Court undergoes the same analysis for provincial powers, concluding that "[t]he provinces may similarly act in relation to environment under any legislative power in s.92."[25] However, the majority does find that it is unhelpful to focus on the project being a "provincial project or an undertaking primarily subject to provincial regulation" which the Court states is "an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation."[26] Instead, the Court held that the federal government can legislate in regard to the federal aspects of local projects and "federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here."[27]

The Court goes on to define environmental assessment as "a planning tool that is now generally regarded as an integral component of sound decision-making."[28] They find that the EARPGO "has merely added to the matters that federal decision makers should consider"; however, they also recognize its limits.[29] For example, while the EARPGO expands the list of matters under federal jurisdiction that must be considered by decision makers, they caution that "an initiating department or panel cannot use the *Guidelines Order* as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power."[30] On the other hand, within these limitations, the decision maker can consider multiple federal impacts in their approval of a proposal under the EARPGO because "[t]here is no constitutional obstacle preventing Parliament from enacting legislation under several heads of power at the same time."[31]

In the end, the Court concludes that the EARPGO has two fundamental matters. The first is that it is concerned with "environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated" which is declared *intra vires* Parliament on the basis of subject matters enumerated in section 91 of the *Constitution Act*.[32] The second is "its procedural or organizational element that coordinates the process of assessment" which touches upon several areas of federal responsibility.[33] This part is declared by the Court to be *intra vires* either "as an adjunct of the particular legislative powers involved" or "justifiable under the residuary power."[34] The pith and substance, therefore, is "an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions" and the legislation "falls within the purely residuary aspect of the [POGG]

[24] *Ibid* at 67.
[25] *Ibid* at 68.
[26] *Ibid* at 68.
[27] *Ibid* at 69.
[28] *Ibid* at 71.
[29] *Ibid* at 71.
[30] *Ibid* at 71-72.
[31] *Ibid* at 73.
[32] *Ibid* at 73.
[33] *Ibid* at 73.
[34] *Ibid* at 74.

power."[35] Further, the SCC concludes that "any intrusion into provincial matters is merely incidental to the pith and substance of the legislation."[36]

Therefore, the answer to the constitutional question "is the *Guidelines Order* so broad as to offend ss 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by Alberta?" is **no**. The EARPGO is declared constitutionally valid.

An overall explanation of the decision comes from Steven Kennett who summarizes the Court's reasoning in five statements:[37]

1. The environment is not a distinct area of jurisdiction under the Constitution;[38]
2. Environmental assessment is an integral component of sound decision-making;[39]
3. Federal environmental jurisdiction extends to two categories of activities – those activities explicitly designated as federal jurisdiction and those with impacts on federal jurisdiction;[40]
4. A project like the Oldman River dam is not a 'provincial project' or immune from federal jurisdiction; and[41]
5. There are constitutional limits on regulatory authority under environmental assessment.[42]

Canadian Environmental Assessment Act, 1992

The second iteration of federal impact assessment law, the *Canadian Environmental Assessment Act, 1992* was passed in 1992 and proclaimed into force in 1995 with the completion of required regulations.[43] Projects requiring an environmental assessment were described in section 5 and applied "where a federal authority:[44]

a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried

[35] *Ibid* at 75.
[36] *Ibid* at 75.
[37] Steven A. Kennett, "Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment" (1993) 21: 4 Alta L Rev 644 at 648-649.
[38] Oldman River*, supra* note 17 at 63-64.
[39] *Ibid* at 71.
[40] *Ibid* at 65-66 & 66-68, 72.
[41] *Ibid* at 68-69.
[42] *Ibid* at 71-72.
[43] *Canadian Environmental Assessment Act,* SC 1992, c 37 [CEAA, 1992].
[44] *Ibid*, s 5(1).

out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to [His] Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

d) under a provision prescribed pursuant to paragraph 59(f) issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part."

These were summarized as four 'triggers', as follows:

- the "proponent trigger" for projects proposed by the federal government,
- the "funding trigger" for projects funded by federal money,
- the "land trigger" for projects located on federal land, and
- the "law list trigger" or those projects listed in the *Law List Regulations*.[45] The law list trigger was the category "pursuant to which the vast majority of environmental assessments were triggered."[46]

In order for any of these four triggers to apply, a proposed project must meet the definition set out in section 2 which defined a project as "(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment, or other undertaking in relation to that physical work, or (b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b)."[47] This represented a change from the EARPGO, which as Martin Olszynski points out "applied to both physical works and policies."[48]

Certain projects were also specifically excluded including those on an exclusion list; instances where the project was to be carried out in response to a national emergency for which special temporary measures were being taken; or if the project was being carried out in response to an emergency.[49] Section 59(c) also authorized the Governor in Council to make regulations

[45] Kristen Douglas & Monique Hebert, "Bill C-9: An Act to Amend the Canadian Environmental Assessment Act" (23 Sep 2003) *Government of Canada Law and Government Division* at part C online: https://publications.gc.ca/Collection-R/LoPBdP/LS/372/372c9-e.htm. [Douglas & Hebert].
[46] Martin Z. P. Olszynski, "Environmental Assessment as Planning and Disclosure Tool: Greenpeace Canada v. Canada (A.G.)" (2015) 38:1 Dalhousie LJ 207 at 211 [Olszynski, Environmental Assessment as Planning].
[47] CEAA, 1992, *supra* note 43, s 2.
[48] Olszynski, Environmental Assessment as Planning, *supra* note 46 at 210.
[49] CEAA, 1992, *supra* note 43, s 7(1).

"exempting any projects or classes of projects from the requirement to conduct an assessment under this Act that (i) in the opinion of the Governor in Council, ought not to be assessed for reasons of national security, (ii) in the case of projects in relation to physical works that, in the opinion of the Governor in Council, have insignificant environmental effects, or (iii) have a total cost below a prescribed amount and meet prescribed environmental conditions."[50]

If all requirements were met and an environmental assessment was deemed warranted it could proceed in four ways:[51]

1. a screening assessment,
2. a comprehensive study,
3. a panel review, or
4. a mediation.

Professor Olszynski notes that the "presumptive track" for projects was to undergo a screening assessment unless the project was listed in the *Comprehensive Study List Regulations,* in which case a comprehensive study was required.[52] Regardless of the assessment track, certain factors were required for consideration including the environmental effects of the project, the significance of these effects, comments from the public, any mitigating measures, and any other relevant matter.[53] Finally, after an assessment was complete, the project may or may not have been allowed to proceed or may have been referred to the Minister for further review.[54]

A number of decisions have considered the jurisdiction of the CEAA, 1992 and we summarize three below.

Quebec (Attorney General) v Moses

The SCC decision in *Quebec (Attorney General) v Moses* focused on the issue of "whether a mining project within the territory covered by the *James Bay and Northern Quebec Agreement* that results in the harmful alteration, disruption or destruction of fish habitat is nevertheless exempted by virtue of the Treaty from any independent scrutiny by the federal Fisheries Minister before issuing the federal fisheries permit."[55] Put more simply, the decision considered whether the federal government is bound by the decision of the Treaty Administrator or province by virtue of the fact that the project is located within negotiated treaty territory.

The Court highlights this starting premise:[56]

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[50] *Ibid*, s 59(c).
[51] *Ibid*, ss 18, 21-24, 29, & 30.
[52] Olszynski, Environmental Assessment as Planning, *supra* note 46 at 211.
[53] CEAA, 1992*, supra* note 43, s 16(1).
[54] *Ibid*, ss 20 & 37.
[55] *Quebec (Attorney General) v Moses,* 2010 SCC 17 at para 1 [Moses].
[56] *Ibid* at para 36.

> "There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*. The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal."

At issue in this decision is a vanadium mine located in an area of Quebec that falls under the *James Bay and Northern Quebec Agreement* (the "Treaty"). In their submitted impact report, the mining proponent acknowledged significant impacts on fish habitat – a federal area of jurisdiction - and even acknowledged that the appropriate federal framework was that of the CEAA.[57]

The SCC began by acknowledging that the federal agencies had been willing to coordinate a joint body to provide an impact assessment but noted that "no joint body was established."[58] They also concluded that the Treaty "specifically provides for processes outside those established by the Treaty."[59] Going further, they note that due to the acknowledged serious impacts on fish habitat, there would in another instance be a requirement to obtain a permit under section 35(2) of the *Fisheries Act*.[60] In light of these factors, the majority found that "the vanadium mine cannot lawfully proceed without a fisheries permit" and "[t]he proponent is unable to obtain, and the federal Minister is unable to issue, a s. 35(2) fisheries permit without compliance with the CEAA."[61] They reject the idea that the provincial review is sufficient under the Treaty to refuse any further federal assessment.[62] In support of this assertion, the Court highlights section 22.7.1 of the Treaty which sets out the obligation to "obtai[n] where applicable the necessary authorization or permits from responsible Government Departments and Services" – in this case a federal fisheries permit.[63] In the end, the assessment process under CEAA, as required to issue a federal permit under section 35(2) of the *Fisheries Act*, was deemed appropriate.

MiningWatch Canada v Canada (Minister of Fisheries & Oceans)

In *MiningWatch Canada v Canada (Minister of Fisheries & Oceans),* the SCC was asked to rule on whether "the environmental assessment track is determined by the project as proposed or by the discretionary scoping decision of the federal authority."[64]

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[57] *Ibid* at para 25.
[58] *Ibid* at para 29.
[59] *Ibid* at para 41.
[60] *Ibid* at para 49.
[61] *Ibid* at para 53.
[62] *Ibid* at para 53.
[63] *Ibid* at para 54.
[64] *MiningWatch Canada v Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2 at para 2 [MiningWatch].

The facts of the case arose when Red Chris Development Corporation Ltd. and BCMetals Corporation proposed the development of an open pit mining and milling project.[65] The project went through both a provincial environmental assessment, during which the province found the project was not likely to cause significant adverse effects, and a federal environmental assessment, which also concluded that the project was not likely to cause significant adverse environmental effects.[66] However, this only occurred after the Department of Fisheries & Oceans' decide to scope the project so as to only include the tailings impoundment area, water diversion system with ancillary facilities, and the explosives storage and/or manufacturing facility rather than the entire project area as initially proposed.[67] This resulted in the screening option for an assessment rather than a comprehensive study.[68]

In response, MiningWatch filed an application for judicial review at the Federal Court, arguing that the federal environmental assessment should have relied on a comprehensive study and that public consultation should have been included.[69] The specific issue before the SCC was "whether DFO and NRCan, as responsible authorities under the CEAA, have been conferred discretion under the CEAA to determine whether an environmental assessment proceeds by way of a screening or comprehensive study."[70]

Section 21 of the CEAA (1992 version) read:[71]

> 21(1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in the assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

The scoping provision of the Act was found in section 15 which read:[72]

> 15(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
> (a) the responsible authority; or
> (b) where the project is referred to a mediator or review panel, the Minister, after consulting with the responsible authority.

The Court found; however, that "a close reading of the relevant provisions of the CEAA leads to the conclusion that it is not within the discretion of the [responsible authority] to conduct only a screening when a proposed project is listed in the CSL (comprehensive study list)."[73] This is

[65] *Ibid* at para 3.
[66] *Ibid* at paras 4 & 7.
[67] *Ibid* at para 6.
[68] *Ibid* at para 6. Note that in CEAA, 1992 there were four levels of a potential assessment including a screening assessment, a comprehensive study, a panel review, or a mediation. A screening assessment would have entailed a less extensive process.
[69] MiningWatch, *supra* note 64 at para 8.
[70] *Ibid* at para 12.
[71] CEAA, 1992*, supra* note 43, s 21(1).
[72] *Ibid*, s 15.
[73] MiningWatch*, supra* note 64 at para 27.

because they held that the definition of a project is more properly the "project as proposed" by the project proponent.[74] As such, "[i]f a project is listed on the comprehensive study list, a comprehensive study is mandatory."[75] Scoping; therefore, should be based on the minimum scope as proposed by the proponent with "discretion to enlarge the scope when required by the facts and circumstances of the project."[76] In the end, the federal assessment could not change the scope of a project in order to fit it into a less comprehensive impact assessment process.

Arlene Kwasniak commented on this case noting that "public interest advocates hailed the decision as it meant that where a project falls under the *Comprehensive Study List Regulation* … the project cannot be downscoped to fall off the list."[77] However, Kwasniak also points out that this was short-lived, with a later amendment to the Act to allow the "Minister to scope the project down for the purpose of what environmental impacts will be assessed."[78]

Greenpeace Canada v Canada (A.G.)

The Federal Court also considered CEAA, 1992 in their decision in *Greenpeace Canada et al. v Canada (Attorney General)*.[79] In this decision, the Federal Court allowed Greenpeace Canada's application for judicial review as it related to a challenge of "the adequacy of the federal environmental assessment conducted by a joint review panel."[80] While the decision was not released until after CEAA, 2012 was passed, it was initiated under the previous regime.

The issues with regard to the CEAA, 1992 were based on the question "did the panel fail to comply with the requirements of the CEAA in conducting the EA by:[81]

i. failing to conduct an environmental assessment of a 'project' as defined in the Act;

ii. failing to consider the 'environmental effects' of the Project as required by s 16 of the Act;

iii. failing to assess the need for, and alternatives to, the Project as required by the Act and the Panel's Terms of Reference;

iv. failing to fulfill its information gathering, public consultation and reporting duties under s 34 of the CEAA; or

v. unlawfully delegating its duties under the Act?"

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[74] *Ibid* at para 28.
[75] *Ibid* at para 34.
[76] *Ibid* at para 39.
[77] Arlene Kwasniak, "The Fading Federal Presence in Environmental Assessment and the Muting of the Public Interest Voice" (19 October 2011) *ABlawg* online: http://ablawg.ca/2011/10/19/the-fading-federal-presence-in-environmental-assessment-and-the-muting-of-the-public-interest-voice/.
[78] *Ibid*.
[79] *Greenpeace Canada et al. v Canada (Attorney General),* 2014 FC 463 [Greenpeace].
[80] *Ibid* at para 1.
[81] *Ibid* at para 19.

In his decision, Justice Russell held that the environmental assessment process relied upon for this approval "failed to comply with the CEAA" in three ways:

1. due to "gaps in the bounding scenario regarding hazardous substance emissions and on-site chemical inventories;
2. in its consideration of spent nuclear fuel; and
3. in the deferral of the analysis of a severe common cause accident."[82]

Martin Olszynski argued that "the most significant" finding from this decision was the "recognition that environmental assessment is an information-gathering tool not just for governments but also and just as importantly for the public" and that the process could be relied upon both to determine the desirability of the project itself and to hold the government accountable for the same.[83] He argued that this is particularly important because environmental assessment does not require any particular outcome but instead the "only barrier for projects considered likely to result in significant adverse environmental effects is a procedural one: cabinet must conclude that such effects are "justified in the circumstances."[84] This is important when considering whether impact assessment is more properly a regulatory framework or a decision-making framework – a discussion which arose in the most recent constitutional battle as it regards impact assessment, the *Reference re Impact Assessment Act*, discussed below.

Canadian Environmental Assessment Act, 2012

The 2012 version of the *Canadian Environmental Assessment Act* was as Brenda Heelan Powell points out "a significant departure from the historical approach to federal environmental assessment in Canada."[85] One of the biggest changes in this new Act was the shift from decision-based triggers in the original CEAA to a project list. In the original CEAA, assessments were triggered by a number of factors rather than a list of projects.[86] However, under the CEAA, 2012 regime, environmental assessment was restricted to projects included in the *Regulations Designating Physical Activities* or those instances when the relevant Minister designated a project as otherwise requiring an environmental assessment.[87] This resulted in a more restrictive approach.[88]

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[82] *Ibid* at Judgment.
[83] Olszynski, Environmental Assessment as Planning, *supra* note 46 at 222.
[84] *Ibid* at 222.
[85] *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, s 52 [CEAA, 2012]; Heelan Powell, *supra* note 10 at 19.
[86] Douglas & Hebert, *supra* note 45 at part C.
[87] *Regulations Designating Physical Activities,* SOR/2012-147; CEAA, 2012, *supra* note 85 s 14(2). The project list was based on the comprehensive studies list which was just a subset of what could be assessed under the original CEAA, such that CEAA 2012 had much reduced scope.
[88] Heelan Powell, *supra* note 10 at 19.

CEAA, 2012 also expanded opportunities for the federal government to opt out of an environmental assessment "on the basis that the project is being assessed provincially" – known as "a substitution or declaration of equivalency."[89] In fact, Brenda Heelan Powell argues that the substitution and equivalency options in CEAA, 2012 were problematic because they allowed federal environmental assessment to be replaced with a provincial process, despite the project in question having environmental impacts that fell within federal constitutional jurisdiction.[90] It is worth noting that despite this ability, the choice to delegate to provincial governments did not transfer constitutional jurisdiction away from the federal government. As Brenda Heelan Powell points out, under CEAA, 2012 "the option to substitute or declare equivalency of a provincial environmental assessment process will only occur in cases where it has been determined that federal environmental assessment is necessary."[91] In other words, federal jurisdiction is established first, before triggering any substitution or equivalency provisions. Again, Heelan Powell distinguishes between the environmental assessment process whereby information gathering is conducted and the regulatory decisions – such as federal approvals – which are separate and which remain with the federal government even in the event of substitution or equivalency.[92]

Impact Assessment Act

In 2021, the newest version of the federal environmental assessment law was passed – the *Impact Assessment Act* ("IAA").[93] As David Wright highlights the "IAA structure closely resembles CEAA, 2012" albeit with certain "new features."[94] The following section will summarize some of these updates, particularly those that may be relevant to the Act's constitutional jurisdiction.

The first change is clearly in name – a shift from environmental assessment to impact assessment. Impacts or 'effects' are defined as "changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes."[95] The Act goes on to states that "effects within federal jurisdiction means, with respect to a physical activity or a designated project:[96]

(a) a change to the following components of the environment that are within the legislative authority of Parliament:
    i. fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act,*
    ii. aquatic species as defined in subsection 2(1) of the *Species at Risk Act,*

[89] *Ibid* at 19.
[90] *Ibid* at 23; see CEAA, 2012*, supra* note 85, s 5 for a list of environmental impacts that qualify.
[91] Heelan Powell, *supra* note 10 at 26.
[92] *Ibid* at 26.
[93] IAA, *supra* note 3, s 1.
[94] David V. Wright, "Implications of the New Federal Impact Assessment Regime for Energy Projects in Alberta" (21 Jun 2021) *Canadian Institute of Resources Law Occasional Paper #75* at 6 [Wright].
[95] IAA, *supra* note 3, s 2.
[96] *Ibid*, s 2.

iii. migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994,* and
iv. any other component of the environment that is set out in Schedule 3,

(b) a change to the environment that would occur
i. on federal lands,
ii. in a province other than the one where the physical activity or the designated project is being carried out, or
iii. outside Canada;

(c) with respect to the Indigenous peoples of Canada, an impact – occurring in Canada and resulting from any change to the environment – on
i. physical and cultural heritage,
ii. the current use of lands and resources for traditional purposes, or
iii. any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;

(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and

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

The proponent of a designated project must not do anything that may result in one of the above effects unless the project has been omitted from the impact assessment process, the proponent has already complied with any required conditions, or the proponent is otherwise permitted.[97]

Professor Andrew Leach points out that in the Factum of the Attorney General of Canada submitted in the *Reference re Impact Assessment Act*, the Government of Canada concedes that this "effects-based trigger" "does not link back to any particular federal decision-making authority, but arises due to the impact a designated project may have on the listed effects within federal jurisdiction."[98] Professor Leach argues that this 'effects based legislation' could result in a project that would otherwise not require any federal permits having to undergo an impact assessment. He considers, for example, a new gas processing facility located on provincial land.[99] He argues that outside of the IAA, this type of project would not necessarily require any federal permits and yet it would still fall under the jurisdiction of the IAA due to its effects.[100] This may represent somewhat of a departure from past impact assessment law.

The IAA also relies on a project list, similar to the previous CEAA, 2012. Martin Olszynski argues that "[l]ike its immediate predecessor, the *Canadian Environmental Assessment Act, 2012*…, the IAA is primarily a "major project" assessment regime – i.e. the regime applies only

[97] *Ibid*, ss 7(1) & (3).
[98] Andrew Leach, "Canada's Constitutional Climate Change Conundrum Part 2: The *Impact Assessment Act* References" (10 Nov 2022) Presentation to the CBA Edmonton Branch online: https://www.cbapd.org/DocViewer.aspx?id=72270&region=AB [Leach] citing *Attorney General of Canada and Attorney General of Alberta,* "Factum of the Appellant The Attorney General of Canada" No. 40195 at para 15 online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/40195/FM010_Appellant_Attorney-General-of-Canada.pdf.
[99] Leach, *supra* note 98.
[100] *Ibid*.

to Canada's largest natural resources and infrastructure projects."[101] To do this, the IAA defines a 'designated project' as "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) [emphasis added]."[102] The project list is set out in the *Physical Activities Regulations* which includes over sixty project types "selected on the basis of their potential to result in impacts on areas of federal jurisdiction."[103]

Additionally, section 9(1) states that the "Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation." This provides another option to instigate the impact assessment process.[104] Again, this refers to the "effects within federal jurisdiction" from section 2.

The IAA also includes a list of factors that the Agency must take into account during the impact assessment process including factors that were not required in the previous CEAA, 2012.[105] One of the notable additions is a "broader scope of assessment" which includes consideration of "the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes."[106] Another addition of note is the section requiring an impact assessment to consider "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."[107] This is perhaps an opportunity to consider impacts on GHG emissions which has not been specifically included in past environmental assessment law.[108] However, we do note that the federal government does not have jurisdiction over the implementation of international treaties unless the subject matter of the treaty otherwise falls within Parliament's jurisdiction.

As David Wright notes, "similar to its predecessors, the IAA contains broad bases for coordination and cooperation with other jurisdictions, and provinces like Alberta in particular."[109] In fact, he notes that one of the purposes of the IAA is "to promote cooperation and coordinated action between federal and provincial governments – while respecting the legislative competence of each – and the federal government and Indigenous governing bodies that are

[101] Martin Olszynski, "Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the *Impact Assessment Act* is unconstitutional" (24 May 2022) *ABlawg* online: https://ablawg.ca/2022/05/24/carbon-tax-redux-a-majority-of-the-alberta-court-of-appeal-opines-that-the-impact-assessment-act-is-unconstitutional/ [Olszynski, "Carbon Tax Redux].
[102] IAA, *supra* note 3, s 2.
[103] *Physical Activities Regulations,* SOR/2019-85; Olszynski, Carbon Tax Redux, *supra* note 101.
[104] IAA, *supra* note 3, s 9(1).
[105] *Ibid*, ss 22(1)(a) – (t).
[106] *Ibid*, s 22(1)(a); Wright, *supra* note 94 at 87.
[107] IAA, *supra* note 3, s 22(1)(i).
[108] Wright, *supra* note 94 at 87.
[109] *Ibid* at 80.

jurisdictions, with respect to impact assessments."[110] For example, section 39(1) of the IAA enables a joint review panel with provinces – including Alberta.[111] The Minister is also able to substitute another jurisdiction's environmental assessment for a federal impact assessment, if it is determined to be an "appropriate substitution."[112] David Wright highlights that this is a change from CEAA, 2012 because under the IAA, the Minister's power to substitute a federal impact assessment "is now permissive, not mandatory."[113]

Finally, the IAA continues in the vein of the CEAA, 2012 in situating final decision-making power in the political realm. The IAA specifies that "after taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister … the Minister must

(a) determine whether the adverse effects within federal jurisdiction – and the adverse direct or incidental effects – that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest; or
(b) refer to the Governor in Council the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest."[114]

The factors that must be considered include:[115]

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

[110] IAA, *supra* note 3, s 6(1)(e).
[111] *Ibid*, s 39(1).
[112] *Ibid,* s 31(1).
[113] Wright, *supra* note 94 at 80.
[114] IAA, *supra* note 3, s 60(1).
[115] *Ibid*, s 63.
[116] This is an important upgrade to the IAA which will be explored in more depth in our module on Indigenous Law & the Constitution.

In response to these changes, the province of Alberta brought an application to the Alberta Court of Appeal asking the Court to declare the Act *ultra vires*. We consider this decision below.

Reference re Impact Assessment Act

In Spring 2022, the Alberta Court of Appeal ("ABCA") released their opinion on the constitutionality of the federal *Impact Assessment Act* ("IAA").[117] They concluded that the Act was *ultra vires* Parliament's jurisdiction and as such declared it unconstitutional. Canada appealed the ABCA opinion to the SCC where it was heard between March 21-22, 2023 with a decision forthcoming. The decision by the SCC to declare the IAA constitutional, or not, will be a major one for the limits of the federal role in the impact assessment of intraprovincial projects. In anticipation of the SCC's decision, we consider the ABCA opinion below.[118]

To begin, the trigger for the ABCA opinion were two constitutional questions put forward by the Alberta government:[119]

1. Is Part 1 of the *An Act to enact the Impact Assessment Act and the Canadian Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts* unconstitutional, in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada? And

2. Is the *Physical Activities Regulations* 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?

Chief Justice Fraser wrote the lengthy decision for the majority in which she provided discussion on myriad topics including relevant provisions of the Constitution, the environment and the division of powers, a history of natural resource ownership in the prairie provinces, the purpose and scope of the resource amendment in the Constitution, an overview of environmental assessment legislation at both the provincial and federal level, and foundational constitutional principles, all before embarking on a division of powers assessment of the IAA. Rather than summarize the decision in its entirety, we will instead focus on a few themes including the majority's distinction of the IAA from past decisions on environmental assessment.[120]

To begin, the ABCA characterized the pith and substance of the IAA as: "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval."[121]

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[117] Reference re IAA, *supra* note 5.
[118] This decision is a reference case which means that no factual issue triggered the case. Rather, it was initiated by the Government asking for the Court's advice. While Reference decisions are not technically binding, governments historically have abided by the decisions in reference cases.
[119] Reference re IAA, *supra* note 5 at para 4.
[120] Olszynski, Carbon Tax Redux, *supra* note 101 and see Oldman River, *supra* note 17; MiningWatch, *supra* note 64; Moses, *supra* note 55 and at the federal court level in Greenpeace, *supra* note 79.
[121] Reference re IAA, *supra* note 5 at para 372.

The ABCA went on to distinguish this decision from past jurisprudence with their focus on 'provincial projects'. Despite quoting from the *Oldman River* decision wherein the SCC found that "what is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a 'provincial project' or an undertaking 'primarily subject to provincial regulation,'" the ABCA still opined that "identifying which government level has the exclusive jurisdiction for the subject activity is not a trap but rather a necessary part of a division of powers analysis."[122]

Professor Olszynski also disagrees with this opinion, arguing that "it is the *power to make laws* that the *Constitution Act, 1867* describes as "exclusive" to one level of government or the other ("to make Laws in relation to Matters coming within the Classes of Subjects"), not the physical works or activities that may be subject to a given legislative regime."[123] The ABCA's argument also seems to rely on the 'watertight compartments' school of federalism which has since fallen out of favour.

In her dissent Justice Greckol seems to agree with Professor Olszynski and cooperative federalism, arguing that "[t]he division of powers provides multiple oars and in many instances no assurance that we will all row in the same direction. But constitutional interpretation can and should at least allow for such cooperation, where feasible. The environment is one such case."[124] In this, she advocates for the newer approach of cooperative federalism. She also highlights that "some local projects will have both a provincial aspect and federal aspect" citing Justice La Forest who held that "[a]lthough local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction."[125] It seems, therefore, that the dissent's explanation of a 'provincial project' is more in line with SCC jurisprudence.

The majority even goes so far as to acknowledge the jurisprudence of cooperative federalism, including the recent *Reference re Greenhouse Gas Pollution Pricing Act*, but then diverts their argument to say that "cooperative federalism has its limits."[126] They suggest that "reliance on cooperative federalism risks eroding the boundaries of provincial jurisdiction by favouring the federal government and centralization of authority."[127] Professors Nigel Bankes and Andrew Leach highlight the use of the phrase 'federal intervention' as it relates to provincial rights which, they say, "carries the implication that the federal government (or perhaps the Court) was acting illegitimately or in breach of the Constitution. The majority offers no support for that characterization."[128]

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[122] Oldman River, *supra* note 17 at para 68; Reference re IAA*, supra* note 5 at paras 106 & 107.
[123] Olszynski, Carbon Tax Redux, *supra* note 101.
[124] Reference re IAA*, supra* note 5 at para 451.
[125] *Ibid* at para 444 citing Oldman River*, supra* note 17 at para 69.
[126] Reference re IAA*, supra* note 5 at para 187.
[127] *Ibid* at para 188.
[128] Nigel Bankes & Andrew Leach, "The Rhetoric of Property and Immunity in the Majority Opinion in the *Impact Assessment Reference*" (June 8, 2022) *ABlawg* online: https://ablawg.ca/2022/06/08/the-rhetoric-of-property-and-immunity-in-the-majority-opinion-in-the-impact-assessment-reference/ [Bankes & Leach].

In a similar vein, the majority also spends a significant amount of time on the history of resource management in Alberta finding that during both the "early history of Canada" and the time between the passage of the *Natural Resources Transfer Act* and the addition of section 92A to the Constitution, the federal government has set out to "claw back" provincial jurisdiction.[129] There has been some disagreement with this assertion including from Bankes and Leach who argue that during the creation of the province of Alberta "there was nothing in the *Alberta Act* to vary the application of s 92 of the *Constitution Act, 1867* to Alberta. In other words, Alberta was born as a province with exactly the same legislative powers as the original provinces of Confederation."[130] In their piece, Bankes and Leach point out that most scholars "consider that s 92A in part confirmed or particularized existing provincial law-making powers and in part expanded them" but did not invent them.[131] Bankes and Leach argue that,

> "the majority simply states that "[u]nlike other provinces, for decades following their entering into Confederation, the prairie provinces were denied ownership of the natural resources in their provinces" (at para 53). The majority omits that these resource rights were used to encourage settlement both by the federal government directly, or through arrangements with the Hudson's Bay Company and the Canadian Pacific Railroad. They were not simply held by Ottawa to the detriment of progress in Alberta."

Another focus of the majority was the idea that a minimum level of harm "must be met before Parliament may legislate."[132] However, Professor Olszynski argues that a minimum threshold of harm would "would seriously hinder Parliament's ability to assess and manage the cumulative impact of numerous projects that individually may not be significant but that collectively exert significant effects on areas of federal jurisdiction."[133] The Court also focuses on the 'self-definition' of "effects within federal jurisdiction" and distinguishes between "effects within federal jurisdiction for purposes of the Act" and "for purposes of the division of powers."[134] They find that "neither government level has the right to define the parameters of its constitutional jurisdiction."[135] In her dissent, Justice Greckol disagrees, arguing that "[i]t is not for the courts to tell Parliament at what point it is allowed to be concerned about harm to the environment in areas within its constitutional jurisdiction."[136]

Throughout their decision the majority also distinguishes the IAA from previous environmental assessment regimes. For example, they find that "[t]he environmental impact assessment process federally has morphed from the procedural planning tool under the Guidelines Order

[129] Reference re IAA, *supra* note 5 at para 27.
[130] Bankes & Leach, *supra* note 128.
[131] *Ibid*.
[132] Olszynski, Carbon Tax Redux, *supra* note 101.
[133] *Ibid*.
[134] Reference re IAA, *supra* note 5 at para 17.
[135] *Ibid* at para 22.
[136] *Ibid* at para 709.

upheld in Oldman River into a substantive regulatory regime under the IAA."[137] The Court also distinguishes the IAA from the CEAA, 2012 (which also relied on a project list) arguing that because the CEAA, 2012 allowed for a provincial assessment of certain projects, not all listed projects required a federal assessment.[138] Despite this assertion, the IAA does allow for a provincial assessment to be substituted for a federal one but unlike the CEAA, 2012, it is discretionary.[139] Overall, the Court holds that under the IAA "the designation of an intra-provincial authority is not contingent on the existence of a federal decision-making authority over that activity" unlike past legislation.[140]

The majority also opines on whether Parliament has jurisdiction over the so-called 'effects on federal jurisdiction' for an otherwise intra-provincial designated project. They argue that "the fact one aspect of the environmental effects of an intra-provincial designated project, the fisheries aspect for example, falls within federal jurisdiction does not give Parliament the jurisdiction to regulate the intra-provincial designated project itself from beginning to end. If it did, that would be a back door route to the federal government's securing what amounts to exclusive jurisdiction over the environment and all intra-provincial activities."[141] Olszynski counters this arguing that this is contradictory to the jurisprudence in *Oldman River* which asserts that "once [an] initiating department has…been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction [emphasis added by Olszynski]."[142] Bankes and Leach also identify precedent for this, noting that "Parliament can, in exercising federal jurisdiction, make a law that impinges on resource development within a province" citing *Moses* "or deny federal permits required for such development" citing *Oldman River.*[143] They highlight *Moses* in which the SCC finds that while the vanadium mine at issue in that case falls within provincial jurisdiction, Parliament still retains authority to regulate over the federal aspects and impacts of the project.[144] (We discuss the decision in *Moses* above)

In her dissent, Justice Greckol disagrees with the majority's distinction between past and current environmental assessment law, arguing that she has not yet heard an explanation "as to why it is constitutionally impermissible for Canada to move from an environmental assessment process triggered by an external statute rooted in a named federal head of constitutional authority (such as that considered in Oldman River) to a project-based environmental assessment approach where the environmental assessment legislation is itself rooted in heads of constitutional power."[145] She suggests that updates to the environmental assessment regime are instead more properly characterized as "progress."[146] Comparing the IAA with past environmental assessment regimes, she suggests that the focus should be on the fundamental

[137] *Ibid* at para 100.
[138] *Ibid* at para 212.
[139] IAA, *supra* note 3, s 31(1).
[140] Reference re IAA, *supra* note 5 at paras 224-225.
[141] *Ibid* at para 179.
[142] Olszynski, Carbon Tax Redux, *supra* note 101 citing Oldman River, *supra* note 17 at para 73.
[143] Bankes & Leach, *supra* note 128 citing Oldman River, *supra* note 17 and Moses, *supra* note 55.
[144] Moses, *supra* note 55 at para 36.
[145] Reference re IAA, *supra* note 5 at para 445.
[146] *Ibid* at para 445.

purpose of each act rather than the accompanying details and she finds that federal environmental assessment law over the years has consisted of each of the following "essential elements:[147]

- an environmental assessment process;
- regulation of environmental effects described as within federal jurisdiction;
- environmental effects broadly defined as inclusive of changes to the physical environment, to health and socio-economic conditions, to physical and cultural heritage, as well as to the use of land and resources for traditional purposes by Indigenous people; and
- cooperation amongst jurisdictions."

She acknowledges that "legislative history does not answer the constitutional question before us" but provides important context and precedent, particularly with regard to SCC decisions upholding past environmental assessment regimes.[148] If the current IAA regime is found to be similar enough to, for example, the EARPGO, it would suggest that the SCC would rely on the precedent in *Oldman River* to uphold the new act.

Notably, in Canada's submission at the SCC they argued that the pith and substance of the IAA was the establishment of a federal environmental assessment process to safeguard against adverse environmental effects in relation to matters within federal jurisdiction.[149] At the hearing, Alberta's characterization of the pith and substance and particularly the distinction between 'adverse effects within federal jurisdiction' and 'all effects' was put to Alberta and the Justices of the SCC questioned whether this pulled the second stage of the analysis, determining whether the matter of the Act fell properly within a federal head of power, into the first part of the pith and substance, identifying the main 'matter' of the Act.[150] The SCC asks whether it is more appropriate to use the language of the Act as it defines effects within federal jurisdiction to determine the pith and substance and from there to move on to a determination of whether this properly falls within a federal head of power.[151] They also had some concern with the idea of a provincial project which was raised by the ABCA and during the hearing, the Justices went so far as to say that this was a novel idea in the law and reiterated that jurisprudence suggests that every individual project has the potential to be regulated both for its federal aspects and its provincial aspects.[152]

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[147] *Ibid* at para 452.
[148] *Ibid* at para 473.
[149] *Attorney General of Canada v Attorney General of Alberta,* Webcast of the Hearing on 2023-03-21 No 40195 online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=40195&id=2023/2023-03-21--40195&date=2023-03-21.
[150] *Attorney General of Canada v Attorney General of Alberta,* Webcast of the Hearing on 2023-03-22 No 40195 online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=40195&id=2023/2023-03-22--40195&date=2023-03-22 [*Attorney General of Canada v Attorney General of Alberta,* 2023-03-22].
[151] *Ibid.*
[152] *Ibid.*

It is clear that despite the majority opinion, scholarly debate remains, and we will have to wait for the SCC to release their opinion in the matter.

Provincial Impact Assessment

Provincial jurisdiction over impact assessment can clearly apply to a number of projects. Provinces have the jurisdiction to regulate impacts on public lands, local works, and undertakings or impacts on their natural resource powers.[153] These heads of power will encompass a number of intraprovincial projects.

In Alberta, the provincial impact assessment regime is set out in the *Environmental Protection and Enhancement Act*.[154] This is a broad piece of legislation that sets out a pollution prevention regime in Alberta as well as impact assessment at the provincial level.

Environmental Protection and Enhancement Act

The *Environmental Protection and Enhancement Act* ("EPEA") and primarily Part 2 of the Act describe the environmental assessment regime in Alberta. Section 44 of the EPEA sets out the stated purpose of environmental assessment in Alberta as follows:

"The purpose of the environmental assessment process is:

a) to support the goals of environmental protection and sustainable development;

b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity;

c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity; and

d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities."

The full environmental assessment process is required for listed "mandatory activities" and when the Director decides "that the potential environmental impacts of the proposed activity warrant further consideration under the environmental assessment process."[155] Mandatory activities are set out in Schedule 1 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*.[156]

[153] *Constitution Act, supra* note 6, ss 92(5), (10) & 92A.
[154] EPEA, *supra* note 4.
[155] *Ibid*, ss 39(c), 43 & 44(1).
[156] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta Reg 111/1993.

Under the EPEA, the environmental assessment process is comprised of four steps:

1. Alberta Environment and Parks notifies the project proponent that the process will apply to the activity at hand;[157]
2. The Director conducts an initial screening to determine any required next steps in the assessment process;[158]
3. If required, is the preparation of an environmental assessment report;[159] and
4. A referral of the assessment report to the Natural Resources Conservation Board, the Alberta Energy Regulator, the Alberta Utilities Commission, or the Minister, as the case may be.[160]

Similar to the federal level, it is *intra vires* provincial jurisdiction for provinces to conduct environmental assessment processes as they have regard to impacts under provincial jurisdiction. For example, Astrid Kalkbrenner highlights that while nuclear power is clearly under federal jurisdiction, provinces can regulate water use in a nuclear power plant through their environmental assessment process.[161] She specifically states that "EPEA's provisions for EA [environmental assessment] regarding water use in a nuclear power plant do not infringe the exclusive federal power over nuclear energy" and "[t]he federal and provincial EA provisions regarding water may coexist."[162]

Municipalities and Environmental Assessment

Municipalities are not included in the constitution but are instead created by statute and derive their jurisdiction from the provincial government. In Alberta, municipalities are allocated power through the *Municipal Government Act* ("MGA") and municipalities are restricted to actions that fall within the four corners of the Act.[163] Further, as provincially created beings, municipalities "cannot purport to assert authority over matters that are not within provincial jurisdiction."[164]

Municipalities do have control over aspects of the environment primarily through their land use planning regime. This can take the form of land use bylaws, municipal development plans, area structure plans, neighbourhood structure plans, neighbourhood area structure plans, and area

[157] EPEA, *supra* note 4, s 43.
[158] *Ibid*, s 44.
[159] *Ibid*, s 45.
[160] *Ibid*, s 53.
[161] Astrid Kalkbrenner, "Environmental Assessment of Nuclear Power Plants in Alberta" (Dec 2013) *Canadian Institute of Resources Law Occasional Paper #43* at 39.
[162] *Ibid* at 39.
[163] *Municipal Government Act*, RSA 2000, c M-26 [MGA].
[164] Brenda Heelan Powell, "Alberta's Municipalities & Environmental Assessment" (Jan 2018) *Environmental Law Centre Community Conserve Project* at 2 online: https://www.communityconserve.ca/wp-content/uploads/2017/06/Pimer_MunicipalEA.pdf [Heelan Powell, Alberta's Municipalities].

redevelopment plans – known as statutory plans.[165] Statutory plans can also be supplemented by non-statutory tools including "transportation plans, recreation plans, community plans, business development plans, and corridor and land use studies."[166]

Section 632 of the MGA permits a municipal development plan to address "environmental matters within the municipality" although it is not required.[167] This suggests that environmental assessment may be included in municipal planning documents so long as it does not exceed provincial jurisdiction and does not contradict provincial law – for example, section 619 of the MGA specifies that "[a] licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC prevails … over any statutory plan, land use bylaw, subdivision decision or development decision."[168]

Incorporating an Indigenous Knowledge Framework for Impact Assessment

In addition to the federal and provincial governments, there has been some movement towards the incorporation of Indigenous Knowledge into our impact assessment processes. However, as of writing, it is relegated to the federal process.

As we note above, the provincial environmental assessment process is set out in the EPEA. Section 40 sets out the purposes of the environmental assessment process which include supporting the goals of environmental protection and sustainable development, integrating environmental protection and economic decision, providing for public participation, and predicting and mitigating environmental, social, economic, and cultural consequences of proposed activities. However, there is no express mention of addressing aboriginal or treaty concerns in the EPEA, despite decisions relating to activities on Crown lands having the potential to impact the exercise of treaty rights within traditional lands.

At the federal level there are numerous purposes set out in the IAA, including fostering sustainability and protecting components of the environment.[169] Additionally, there are specific purposes related to Indigenous peoples including:

- to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;

[165] MGA, *supra* note 163, Part 17; For a summary of these statutory planning rules see: Heelan Powell, Alberta's Municipalities, *supra* note 164 at 11-12.
[166] Heelan Powell, Alberta's Municipalities, *supra* note 164 at 12 citing James S. Mallet, Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role (Edmonton, AB: 2005, Environmental Law Centre).
[167] MGA, *supra* note 163, s 632(3)(b).
[168] *Ibid*, s 619(1).
[169] IAA, *supra* note 3, s 6.

- to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section of 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act; and
- to ensure that an impact assessment takes into account… Indigenous knowledge.[170]

Further, the IAA sets out a mandate for administration of the Act that requires the Government of Canada, the Minster, the Agency, and federal authorities to exercise their powers in a manner that respects the Government's commitments with respect to the rights of Indigenous peoples.[171] The IAA also contains provisions that – among others – clarify that nothing in the Act abrogates or derogates from the protection provided to Indigenous rights by the *Constitution Act, 1982*, recognize proponents' agreements with Indigenous governing bodies, and address the use of Indigenous knowledge. Throughout, the federal impact assessment process includes requirements to consult with Indigenous peoples, as well as consider impacts upon Indigenous peoples.

As reflected in the IAA, Indigenous knowledge is recognized by the federal government as an important part of project and regulatory decision-making. In order to have consistent application of provisions dealing with Indigenous knowledge (under the IAA and in other legislation), the federal government has developed the *Indigenous Knowledge Policy Framework for Project Review and Regulatory Decisions* [*IK Framework*].[172] The *IK Framework* defines Indigenous knowledge as "collective knowledge that encompasses community values, teachings, relationships, ceremony, oral stories and myths" and that is "community specific and place-based, arising from Indigenous Peoples' intimate relationship with their environment and territory over thousands of years."[173] The *IK Framework* sets out five principles that are to be followed when applying Indigenous knowledge provisions of the IAA (and certain other federal legislation), and each principle is accompanied by several guidelines.[174]

[170] *Ibid*, s 6.
[171] *Ibid*, s 6(2).
[172] Government of Canada, *Indigenous Knowledge Policy Framework for Project Review and Regulatory Decisions* (n/d).
[173] *Ibid*.
[174] The *IK Framework* applies to the IAA as well as the *Canadian Energy Regulator Act*, the *Fisheries Act* and the *Canadian Navigable Waters Act*.

FINAL THOUGHTS

Effective impact assessment requires a complex regulatory framework and legislation at both the provincial and federal level. Over the years we have seen multiple iterations of this type of legislation including the most recent *Impact Assessment Act* which as we note above is the subject of recent constitutional debate. Clearly, the assessment of interprovincial projects falls squarely within the federal government's jurisdiction but as we see in the *Reference re Impact Assessment Act,* it remains to be seen how far this jurisdiction extends over intraprovincial projects.

If we look back at *Oldman River,* the SCC clarified that federal jurisdiction enables the consideration of multiple federal impacts because "[t]here is no constitutional obstacle preventing Parliament from enacting legislation under several heads of power at the same time."[175] However, the Court also cautioned that an environmental assessment process cannot be used as a "colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power."[176] This comes up in the *Reference re IAA,* where we have heard arguments that this 'effects based legislation' could result in a project that would otherwise not require any federal permits having to undergo an impact assessment. [177] On the other hand, in the recent SCC hearing certain Justices of the Court reiterated that every individual project has the potential to be regulated both for its federal and provincial aspects.[178]

If the SCC limits federal jurisdiction in this regard, the federal government will be faced with a decision between reverting to a narrower version of assessment as seen in past legislation or abandoning assessments altogether. The latter choice would abandon key decision making and planning tools for assessing impacts on heads of power that are exclusively within the jurisdiction of the federal government. In both instances, a narrowing of the scope of assessments may also undermine the potential for assessments to act as a tool to facilitate more effective incorporation of Indigenous concerns. If such a federal abandonment of the field were to occur it will be essential that the provinces step in if we are to have a consistent high-standard of impact assessment across the country. The effects of these projects are major and as such their approval should be considered with regard to all effects – whether they fall under the federal or provincial regime. What remains clear is that the challenges of delineating jurisdictional lines around assessments is reflective of the broader challenges of dealing with environmental issues under the Constitution. To unnecessarily narrow assessment considerations to carved out jurisdictional buckets will only serve to ensure that the environment and ecosystems are not properly considered and protected.

[175] Oldman River*, supra* note 17 at 71-72.
[176] *Ibid* at 73.
[177] Leach, *supra* note 98.
[178] *Attorney General of Canada v Attorney General of Alberta,* on 2023-03-22, *supra* note 150.