Court File No.: 40195

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

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

AND IN THE MATTER OF: A Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c J-2, s 26

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

– and –

ATTORNEY GENERAL OF ALBERTA

Respondent

Style of Cause Continues on Next Page

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PART I – OVERVIEW AND CONCISE STATEMENT OF FACTS

1. The *Impact Assessment Act*[1] (the "*Act*") gives federal decision makers almost completely unfettered power to decide whether local works and undertakings are in the public interest. In both purpose and effect, it is an invalid colourable attempt to regulate local works and undertakings, public lands, electricity generation, non-renewable natural resources, and forestry resources; matters which the Constitution expressly assigns to the provincial Legislatures.

2. Even if the *Act* is not unconstitutional in its entirety as the Alberta Court of Appeal found, the power the *Act* grants federal decision makers to designate any project that emits greenhouse gases ("GHGs") or other pollutants that may adversely impact another province ("interprovincial pollutants") or that may require activity Canada might prohibit (but has not actually yet prohibited) are not supported by any federal head of power. Parliament does not have jurisdiction over all GHGs and other interprovincial pollutants. Nor does its criminal law power permit Canada to regulate projects that involve behaviour Canada has not yet prohibited.

3. Under the *Act,* once *any aspect* of a project is found to potentially impact *any* federal head of power, federal decision makers are given a broad power to consider the overall desirability of the project. The *Act* makes no effort to limit federal decision makers to only consider matters that are *linked* to the federal heads of power that purportedly led to a project being designated in the first place. This is a far cry from the limited, ancillary power to conduct environmental assessments to inform federal regulatory decisions that this Court upheld in *Oldman River*.[2]

4. Instead, from the most tenuous connection to federal jurisdiction, the *Act* conjures sweeping federal regulatory powers to approve or reject projects that otherwise fall within exclusive provincial jurisdiction. In this regard, the *Act* can be described as a colourable intrusion into an exclusively provincial domain that profoundly disturbs the balance of Canadian federalism.

5. As Ontario's recent experience with the designation of the proposed Highway 413 demonstrates, the *Act* permits local works and undertakings to be delayed for years while federal decision makers determine whether the projects contribute sufficiently to Canada's international commitments, sustainability, and other factors that the federal authorities view – in their sole

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[1] SC 2019, c 28, s 1 [*IAA*]
[2] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*]

discretion – as being in the "public interest." Without federal permission, no project designated under the *Act* can proceed. This is so even for projects clearly within provincial competence, built entirely on provincial Crown land, and, as in the case of Highway 413, where the project's completion was a central campaign promise on which a provincial government was elected.

6. Under our federal constitutional dispensation, and consistent with the principle of subsidiarity, the overall public interest of a clearly intra-provincial work or undertaking is a matter for provincial governments accountable to provincial electorates. Federal authority is properly limited to those aspects of a project that actually fall within federal jurisdiction, not to a consideration of a project's overall public interest. That consideration is for the relevant provincial decision makers. Were it otherwise, our federalism would lose meaning.

7. Ontario accepts the facts as set out by Alberta and relies on the following additional facts regarding the Highway 413 project as set out in Ontario's motion to adduce new evidence.[3]

A. Ontario's Campaign Promise to Build Highway 413 to Address Traffic in the GTA

8. Before the most recent provincial election, the current Ontario government promised to build a new multimodal transportation corridor (the "Highway 413 Project") in the Greater Golden Horseshoe ("GGH").[4] The GGH is one of the fastest growing regions in North America and future population and employment growth in major urban centres will result in a significant increase in travel demand for both people and goods across the area. Addressing transportation needs in the region is essential to the competitiveness of Ontario's economy.[5]

9. The Ontario Ministry of Transportation ("MTO") is the proponent of the project. Once completed, Highway 413 will be owned by the Province of Ontario and situated entirely on public lands in Ontario that belong to the Province. The Project is subject to an individual environmental assessment, the most complex level of assessment under the Ontario *Environmental Assessment Act*.[6] Through this comprehensive process, MTO is required to

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[3] Order of Justice Brown dated January 16, 2023.

[4] Affidavit of Brenda Liegler, affirmed December 14, 2022 (the "Liegler Affidavit") at para 5, Motion Record of the Intervener, Attorney General of Ontario ("MR"), Volume ("Vol") 1, Tab 2 at 13

[5] Liegler Affidavit at para 3, MR, Vol I, Tab 2 at 18-19

[6] There are two types of EA processes for undertakings that are subject to the *EAA*; the individual EA process and various streamlined processes. No person may proceed with an undertaking

consider all impacts to the environment (including those within federal jurisdiction), mitigate these impacts, and undertake robust and meaningful consultation at each stage (design to construction). In addition, MTO has committed to working closely with community partners, the municipalities, the public, and Indigenous communities as the Project is advanced.[7]

B. The Federal Minister Designates the Highway 413 Project under the *Act* at the Request of Opponents of the Project

10. The Highway 413 Project does not involve any of the activities listed in the *Physical Activities Regulations*.[8] Accordingly, it would not ordinarily be subject to a federal impact assessment. The Impact Assessment Agency of Canada ("IAAC" or the "Agency") confirmed that fact in March 2020. Nevertheless, opponents of the Project asked the federal Minister of Environment and Climate Change to designate the Project under s. 9(1) of the *Act*.[9]

11. Despite MTO providing IAAC a 164-page document setting out why the Project should not be designated,[10] on May 3, 2021, the federal Minister designated the Project on the basis that it "may cause adverse direct or incidental effects on the critical habitat of federally-listed species at risk that may not be mitigated through project design or the application of standard mitigation measures, or through existing legislative mechanisms." The Minister's decision notes that "[t]he Minister also took into account the public concerns related to these potential effects."[11]

12. The Minister's decision did not specify which "federally-listed species at risk" were engaged. However, the IAAC Analysis Report relied on by the Minister identifies the species at risk as the Western Chorus Frog, Red-headed Woodpecker and Rapids Clubtail, acknowledging that these species' critical habitat on provincial land where the Highway 413 Project will be built are not all currently protected under the federal *Species at Risk Act*:[12]

> Currently, the critical habitat for Western Chorus Frog is only protected under the *Species at Risk Act* on federal lands. Because this project is on provincial lands, the Western Chorus Frog or its critical habitat is not currently protected. Its habitat

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subject to the Act without approval to proceed: *Environmental Assessment Act*, RSO 1990, c E18, ss 5(3) and 6.1 [*EAA*].

[7] Liegler Affidavit at para 6, MR, Vol I, Tab 2 at 20; See also *EAA* ss 6, 6.1 to 6.4, 7 and 7.2
[8] SOR/2019-285 [*Physical Activities Regulations*]
[9] Liegler Affidavit at paras 7-10, MR, Vol I, Tab 2 at 20-21
[10] Liegler Affidavit at para 12, MR, Vol I, Tab 2 at 22
[11] Exhibit H to Liegler Affidavit, MR, Vol II, Tab 2(H) at 7
[12] SC 2002 c 29 [*SARA*]

> is also not protected under Ontario's *Endangered Species Act*. While Red-Headed Woodpecker individuals and residences receive protection under the *Species at Risk Act*, habitat for Red-headed Woodpecker beyond its residence is not currently protected under the provincial *Endangered Species Act* or the *Species at Risk Act*. It is not known whether a provincial environmental assessment will mitigate for impacts to habitat of these species. Additional analysis would be required to understand the potential effects on these species and appropriate mitigation measures to address these effects.[13]

13. Since January 2022, the habitat (not just the residence) of the Red-headed Woodpecker is protected under Ontario's *Endangered Species Act*.[14] As noted above, a provincial environmental assessment was already under way at the time of the designation.

C. Ontario Has Already Been Required to Respond to Extensive Federal Inquiries Unrelated to the Purported Reason the Project Was Designated

14. As a result of the designation under the *Act*, MTO must prepare an Initial Project Description ("IPD") that the IAAC will use to determine if an impact assessment is required under the *Act*.[15] On October 26, 2021, the MTO submitted a 321-page draft IPD for the Highway 413 Project to IAAC. IAAC, however, not satisfied with this comprehensive document, asked for significant information on topics with no relation to the purported reason for the designation under the *Act* (the three federally-listed species at risk), including the following issues:

- Provide "a summary of the consultation[s] …with Indigenous communities…".[16] This request did not ask for information about consultations relating to the federally-listed species at risk; instead, it required the MTO to provide information on a broad range of unrelated topics, including the current use of lands and resources for traditional purposes and the health, social, and economic conditions of Indigenous peoples.[17]

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[13] Analysis Report, Whether to Designate the GTA West Project in Ontario Pursuant to the *Impact Assessment Act* at 6-7; also at Exhibit I to Liegler Affidavit (IAAC Analysis Report), MR, Vol II, Tab 2(I) at 15-16

[14] Section 10 of the *Endangered Species Act*, *2007*, SO 2007 c 6 [*Endangered Species Act*], prohibits damage or destruction of the habitat of a species listed on the *Species At Risk In Ontario List*, O Reg 230/08 [*Species At Risk In Ontario List*]. The Red-headed Woodpecker is currently listed as an "Endangered Species" on the *Species At Risk In Ontario List*.

[15] Liegler Affidavit at paras 18 and 36, MR, Vol I, Tab 2 at 24 and 30 ; *IAA*, ss 10(1), 16, 112(1); *Information and Management of Time Limits Regulations*, SOR/2019-283, ss 3-4 and Sch 1 and 2 [*Information and Time Limits Regulations*]

[16] Liegler Affidavit at para 42, MR, Vol I, Tab 2 at 32

[17] Comments from IAAC on Draft IPD at Comment ID 4-1, Exhibit Q to Liegler Affidavit, MR, Vol IV, Tab 2(Q) at 11

- Identify "the Strategic Assessment of Climate Change in this section as a strategic assessment that is relevant to the Project," including information regarding "…net GHG emissions, impact on carbon sinks, mitigation measures, net-zero plan and upstream GHG assessment published in August 2021 for additional details." [18]
- Describe "the social impacts due to the Project in the IPD" (Comment 15-1).[19]

15. The requested additions cover issues relevant only if an impact assessment under the *Act* is required.[20] The IAAC also required the MTO to make significant editorial revisions, consuming considerable time while the MTO has been limited in its ability to take steps to advance the Project.[21] In follow-up discussions, IAAC staff have told the MTO that a "no impact assessment" result is more likely if the MTO provides more detailed information about issues of concern to the IAAC, whether related or unrelated to the reason for designation under the *Act*.[22]

D. More Than One Year After Designation, the Agency Has Still Not Even Approved an Initial Description of the Project

16. More than a year after designation and despite MTO providing extensive responses to IAAC's broad-ranging inquiries, IAAC has still not accepted a final IPD. Rather, the MTO is still responding to follow-up questions, revisions to its draft IPD, and requests for information, that are mainly unrelated to the reasons the Project was designated.[23] IAAC has recommended that MTO submit a second draft of the IPD prior to submitting the final IPD.

17. Given the scope of IAAC's comments, MTO expects to file a second draft IPD in the spring of 2023 and a final IPD in the fall of 2023.[24] If the IAAC accepts the final IPD, the MTO will still have to prepare a Detailed Project Description ("DPD") which may be subject to further comments and revision. It is only after the IAAC accepts the IPD and the DPD that a decision regarding whether an impact assessment is warranted is made. This may be years after designation of the project.[25]

18. IAAC has also been unwilling to approve fieldwork MTO must conduct, causing MTO

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[18] Liegler Affidavit at para 37-44, MR, Vol I, Tab 2 at 30-33
[19] Liegler Affidavit at para 41, MR, Vol I, Tab 2 at 32
[20] Liegler Affidavit at para 19 and 44, MR, Vol I, Tab 2 at 24-25 and 33
[21] Liegler Affidavit at paras 19 and 43, MR, Vol I, Tab 2 at 24-25 and 33
[22] Liegler Affidavit at paras 31 and 35, MR, Vol I, Tab 2 at 29 and 30
[23] Liegler Affidavit at para 19, MR, Vol I, Tab 2 at 24-25
[24] Liegler Affidavit at para 56, MR, Vol I, Tab 2 at 36
[25] Liegler Affidavit at paras 57-58, MR, Vol I, Tab 2 at 37; Guide to Preparing an Initial Project Description and a Detailed Project Description - Canada.ca; *IAA*, ss 15(3), 16(1)

significant delays in progressing the Highway 413 Project design, provincial environmental assessment and completing an IPD that is satisfactory to the IAAC.[26] While the MTO ultimately proceeded with certain fieldwork it believes was compliant with the *Act* (putting itself at risk of prosecution if wrong), MTO lost most of the 2021 fieldwork season in seeking guidance from the IAAC.[27]

PART II – POSITION

19. Ontario's position is that the entire *Act* is *ultra vires* Parliament, as in pith and substance it regulates whether local works and undertakings should proceed in the public interest.

20. In the alternative, Ontario's position is that the *Act*:

a) Impermissibly permits federal authorities to designate projects that emit any amount of GHGs or other interprovincial pollutants even though Parliament does not have a general jurisdiction over such pollution;

b) Impermissibly permits federal authorities to designate projects merely on the basis that Canada may later choose to prohibit activities required to undertake the project; and

c) Impermissibly permits federal authorities to regulate all aspects of a designated project, not just those linked to the federal head of power that supported the designation.

PART III – ARGUMENT

A. Characterization – The Pith and Substance of the *Act* Is to Determine Whether Designated Projects Are In the Public Interest as Determined by Canada

21. This Court has made clear that the characterization and classification stages of the division of powers analysis are and must be kept distinct. The pith and substance of a challenged statute or provision must be described in a manner that captures the law's essential character in terms that are as precise as the law will allow.[28] Both the purpose and effect of the *Act* make clear that its dominant characteristic is not merely to determine if the environmental effects of a project warrant federal regulatory intervention: its purpose is to regulate the projects themselves and its

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[26] Liegler Affidavit at paras 21-30, MR, Vol I, Tab 2 at 25-29
[27] Liegler Affidavit at para 30, MR, Vol I, Tab 2 at 28-29
[28] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 52 and 56 [*GGPPA References*]

effect is to delay and even prohibit projects that fall within exclusive provincial jurisdiction.

22. As Alberta sets out at paragraphs 26 to 104 of its factum, both the intrinsic and extrinsic evidence of the *Act*'s purpose demonstrate that the *Act* is intended to do far more than inform Canada's usual regulatory decision-making processes like the narrower federal environmental assessment legislation upheld by this Court in *Oldman River*. Instead, the *Act* is intended to give the federal Cabinet the final decision-making authority on whether any local work and undertaking federal authorities decide to designate is in the public interest.

23. Similarly, as Alberta points out at paragraphs 141 to 155 of its factum, the legal effect of the *Act* is to prohibit any action being taken on a designated local work or undertaking until when and if first the IAAC and then the federal Minister and/or Cabinet decide the project *as a whole* is in the public interest, as determined solely by Canada. In doing so, federal decision makers can take into account not just whether the project has significant adverse effects on matters that fall within federal jurisdiction, but also vague undefined matters such as "the purpose of and need for the designated project," "the intersection of sex and gender with other identity factors," the extent to which the project contributes to "sustainability" and "the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change," and "any other matter relevant to the impact assessment" as determined by the Agency itself.[29] If federal decision makers are not convinced that an otherwise entirely provincial project, even one being built by a provincial Crown on provincial Crown land, is "in the public interest" as defined by Canada the project cannot proceed; ever.[30]

24. Further, even where the federal decision makers ultimately do approve a local work or undertaking, the "'side' effects that flow from the application of" the *Act* can still have an enormous practical effect on the cost and timeliness of completing what would otherwise be a provincially-regulated project.[31] Before IAAC even begins to review a project, the proponent must first provide an IPD and DPD. Each of these project descriptions must contain twenty-five categories of information, running hundreds or even thousands of pages. The Agency can require

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[29] *IAA*, ss 16(2), 22(1), and 63
[30] *IAA*, ss 7, 16(1), 60-62, and 65
[31] *GGPPA References* at para 51

unlimited revisions of each and request any information or details the Agency specifies.[32]

25. The project cannot proceed until the multiple inquiries and any hearings required under the *Act* are completed. Even if all of those steps are completed within the *Act*'s statutory timelines, the resulting delay is measured in years:

Initial Description Stage: Until Agency satisfied with proponent's description

Detailed Description Stage: Until Agency satisfied with proponent's description

Planning Phase: 180 days

Impact Statement Phase: Up to three years

Impact Assessment Phase: Up to 300 days for Agency-led assessments and up to 600 days if the Minister refers the project to a review panel

Decision-Making Phase: 30 days for Minister's decision and a further 90 days if the Minister refers the decision to Cabinet[33]

26. The Agency, the Minister, and Cabinet have broad discretion to extend these timelines. Some such extensions can be for an indefinite period.[34] No work can be undertaken on a project until the Agency determines no assessment is required or the entire process is complete.[35] Given the potentially indefinite length of the early stages of the process, even a project that will ultimately be found not to impact any area of federal jurisdiction can still be delayed for years.

27. Since the hearing below, Ontario's experience with the federal designation of the Highway 413 Project has provided an illustrative example of the *Act*'s impact even when a project is designated due to its potential impact on a narrow matter of purported federal jurisdiction.

28. Although the Highway 413 Project was designated solely due to impacts it might have on the habitat of three federally-listed species at risk, Ontario has already been required to provide detailed information on a broad range of issues unrelated to those species' habitat.[36] The IAAC has told Ontario that the likelihood of receiving a determination that a full impact assessment is not required is dependent on Ontario providing detailed information to address the IAAC's concerns (whether related or unrelated to the reason for designation under the *Act*).[37]

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[32] *IAA*, ss 10(1), 14(1), and 15; *Information and Time Limits Regulations*, ss 3-4 and Sch 1 and Sch 2

[33] *IAA*, ss 18(1), 19(1), 28(2), 36(1), 37(2), 37.1(2), and 65(3)-(4)

[34] *IAA*, ss 18(3), 18(5), 19(2), 28(5)-(7), 28(9), 36(3), 37(3)-(4), 37.1(4), and 65(5)-(6)

[35] *IAA*, ss 7, 16(1), 60-62, and 65

[36] Liegler Affidavit at para 42, MR, Vol I, Tab 2 at 32-33

[37] Liegler Affidavit at paras 31-32, MR, Vol I, Tab 2 at 29

29. Nineteen months have passed since designation of the Highway 413 Project under the *Act* and over a year since Ontario submitted a draft IPD. The 321-page draft IPD submitted by Ontario was not sufficient to meet IAAC's questions about a range of matters unconnected to the reason for designation. Addressing those voluminous inquiries will take months more. The IAAC will then still have to receive and accept Ontario's DPD before it begins to consider whether an impact assessment is warranted.[38] Meanwhile, Ontario cannot move forward with a mandate commitment, including its own environmental assessment, due to the *Act*'s prohibitions.[39]

B. Classification – The *Act* Cannot Be Supported by Parliament's Heads of Power

1) The *Act* Is a Colourable Attempt to Regulate Local Works and Undertakings

30. The *Act* gives federal authorities broad discretion to determine whether a designated project is in the "public interest" and thus should proceed. Even when a project ultimately is allowed to proceed, its proponent may face years of delay and the prospect of providing the IAAC reams of documentation and analysis on *all* aspects of the project even where the purported grounds of federal jurisdiction are narrow. When a designated project is something such as an aerodrome or an interprovincial railway that itself falls within federal jurisdiction, such onerous requirements can be supported by the relevant federal head of power. But many of the projects designated by the *Physical Activity Regulations* fall within provincial jurisdiction over matters such as:

> **Section 92(4)**: The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
>
> **Section 92(10)**: Local Works and Undertakings
>
> **Section 92(16)**: Generally all Matters of a merely local or private Nature in the Province
>
> **Section 92A(1)(b)**: Development, conservation and management of non-renewable natural resources and forestry resources in the province
>
> **Section 92A(1)(c)**: Development, conservation and management of sites and facilities in the province for the generation and production of electrical energy

As well, the federal Minister retains discretion under section 9 of the *Act* to designate any local work or undertaking, even a provincial government's mandate commitment being built entirely on provincial Crown land, such as Highway 413.

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[38] See s 14-16 of the *Act*; See also Liegler Affidavit at para 36, MR, Vol I, Tab 2 at 30: *Guide to Preparing IPD and DPD*: "Impact Assessment Determination"

[39] Liegler Affidavit at paras 30 and 59, MR, Vol I, Tab 2 at 28-29 and 38

31. Canada argues that the *Act* as it applies to these provincially-regulated local works and undertakings can be upheld as a valid exercise of a variety of federal heads of power such as fisheries, migratory birds, the criminal law power, and the national concern branch of the peace, order, and good government ("POGG") power in the same way that the predecessor *Guidelines Order* was upheld in *Oldman River*. Canada relies on the "incidental effects" doctrine to argue that any impact on provincially-regulated projects should not affect the validity of the *Act*.

32. For the reasons set out at paragraphs 4 and 39 to 53 of Alberta's factum and paragraphs 19 to 27 above, however, the *Act* goes much further than the *Guidelines Order*. Its "main thrust"[40] is not just to gather information so federal regulatory agencies can decide whether to exercise their regulatory powers. The regulation of local projects is not "collateral and secondary to the mandate of the enacting legislature" as required by the "incidental effects" doctrine.[41] Rather, as discussed above, the *Act*'s purpose and effects show that its "main thrust" is to determine whether local works and undertakings are in the public interest, as determined federally.

33. Canada also relies on the double aspect doctrine. But that doctrine "should be applied cautiously to avoid eroding the importance attached to provincial autonomy in this Court's jurisprudence."[42] It only applies "in clear cases where the multiplicity of aspects is real and not merely nominal."[43] The *Act* attempts to assess the wisdom of local projects in their entirety, not merely in so far as they require federal regulatory decisions on matters within federal authority – such as fisheries. Parliament has no "compelling interest" in regulating local works and undertakings *qua* undertakings. [44] There thus is no true double aspect.

34. As this Court held in *Canadian Western Bank*, problems resulting from incidental effects can be resolved by a "firm application of the pith and substance analysis." Here, the scale of the *Act*'s incidental effects do "indeed put a law in a different light so as to place it in another constitutional head of power."[45] The *Act*'s impact on local projects goes far beyond mere incidental effects. Federal decision makers are required to consider a wide range of factors

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[40] *Reference re Securities Act*, 2011 SCC 66 at paras 63-65 [*Senate Reference*]
[41] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 28 [*Canada Western Bank*]
[42] *GGPPA References* at para 128
[43] *Bell Canada v Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749 at 766
[44] *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 85
[45] *Canadian Western Bank* at para 31

unlinked to any federal head of power and determine whether, in their view, the project *should* proceed. Insofar as the *Act* applies to local works and undertakings, electricity generation projects, non-renewable resource projects, forestry projects, projects on provincial public land, and other local projects, it is a colourable attempt to exercise the provinces' exclusive jurisdiction over those matters and, at a minimum, should be read down.

2) In Any Event, the *Act* Purports to Regulate "Adverse Federal Effects" That Are Not Matters that Fall Within Federal Jurisdiction

35. Even if Canada is correct that the *Act* only regulates potential adverse effects of local projects on matters within federal jurisdiction, not all of the "adverse effects" it purports to regulate are matters within federal jurisdiction. Parliament can only regulate environmental matters "truly in relation to an institution or activity that is, otherwise, within [federal] legislative jurisdiction."[46] Parliament can require federal decision makers to consider several federal matters at one time, but each matter must independently fall within federal jurisdiction.

36. Parliament has no POGG power to regulate local works and undertakings solely because they affect the environment in another province or outside Canada. Nor does it have a general POGG power to regulate GHG emissions, outside the narrow power this Court recognized to set national backstop levels for carbon pricing. Finally, as set out below, Parliament cannot ground environmental assessments on criminal law prohibitions that have not yet been enacted.

a) This Court's Jurisprudence Has Not Yet Recognized a Federal Power Over Works and Undertakings That Produce Interprovincial Pollution

37. Contrary to Canada's suggestion at paragraphs 136-138 of its factum, this Court has never found Parliament to have a general jurisdiction over all activities that have environmental effects outside their province of origin. The *ratio* of *Interprovincial Co-operatives Ltd et al v R*[47] on which Canada relies,[48] was that Manitoba could not impose tort liability on Saskatchewan and Ontario for environmental harm they caused in Manitoba. Pigeon J. writing for three judges suggested in *obiter* that neither Saskatchewan nor Ontario could have validly legislated concerning liability for those environmental harms because Canada had a general POGG

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[46] *Oldman River* at 69 and 72-73, citing *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790 at 808

[47] [1976] 1 SCR 477 [*IPCO*]

[48] Factum of the Appellant at FN 190

jurisdiction over all interprovincial pollution.[49]

38. That claim was not advanced by any of the parties in *IPCO* and was not accepted by Ritchie J., the fourth judge in the majority. As the majority of this Court subsequently recognized in *R v Crown Zellerbach*, Ritchie J. did not accept that the regulation of local undertakings which cause environmental impacts in another province fell within federal jurisdiction.[50] He held it fell within provincial jurisdiction, just not that of Manitoba:

> It follows that if there were licences making the appellants' "mercury discharging activities" in Saskatchewan and Ontario justified, this not only gave rise to the civil right under the law of those provinces, but to a concomitant civil right to have those licences recognized in the Courts of Manitoba in determining whether or not the action is properly founded in that province.[51]

39. Ritchie J. held Parliament did have jurisdiction to regulate pollution in interprovincial waters, but only under its fisheries power, not a POGG power over all local undertakings that might cause interprovincial pollution.[52] The majority in the *GGPPA References* suggests that La Forest J.'s statement in *Crown Zellerbach* (in dissent) that there was such a general POGG power was the Court's view in that case.[53] A careful reading of Le Dain J.'s reasons for the majority, however, makes it clear that Ritchie J.'s comments in *IPCO* supporting federal jurisdiction over interprovincial pollution were based solely on the fisheries power.[54] A majority of this Court has therefore never found Parliament to have a general POGG power over all interprovincial pollution. For the reasons set out below, it should not do so now.

b) Parliament Should Not Be Found to Have Jurisdiction Over GHGs in Particular or Interprovincial Pollution in General

40. In the *GGPPA Reference*, the majority of this Court recognized a narrow power under the national concern branch of POGG to "establish minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions."[55] The majority rejected a number of broader characterizations of the proposed power that had been accepted in the Courts below,

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[49] *IPCO* at 512-14 (*per* Pigeon J)
[50] [1988] 1 SCR 401 at 434-36 [*Crown Zellerbach*]
[51] *IPCO* at 523-26 (*per* Ritchie J)
[52] *IPCO* at 518-20 (*per* Ritchie J)
[53] *GGPPA References* at para 99
[54] *Crown Zellerbach* at 434-36
[55] *GGPPA References* at para 207

advanced by the parties, and adopted by Justices Brown and Rowe in dissent.[56]

41. This Court's recognition of such a carefully tailored federal power does not support the constitutionality of the *Act*, which goes beyond imposing a minimum *price* on GHG emissions to assert that emissions *themselves* are an "adverse effect within federal jurisdiction" sufficient: (a) to trigger a federal impact assessment; and (b) permit federal authorities to determine whether a local work or undertaking is in the public interest, considering a wide range of factors including but not limited to emissions. The *Act's* Preamble, the factors federal decision makers must consider, the types of projects designated under the *Physical Activities Regulations*, and the Discussion Paper which led to those regulations all make clear that any amount of GHG emissions or other interprovincial pollutants can be considered an "adverse effects within federal jurisdiction" capable of triggering an impact assessment.[57]

42. Such a broad federal jurisdiction over GHGs and other interprovincial pollutants is not consistent with this Court's decision in the *GGPPA Reference*. On the contrary, in restating the test for recognizing a new matter of national concern, the majority noted that the national concern doctrine was developed to provide a "workable framework for identifying federal authority … in appropriate, exceptional cases *and* for adequately constraining federal power in accordance with the principle of federalism."[58] Accordingly, the national concern doctrine does not automatically create unlimited federal jurisdiction with regard to a new matter of national concern.[59] Instead, "the scope of the federal power … depends on the nature of the national concern at issue in the case in question."[60] In upholding the *GGPPA*, this Court only granted Parliament jurisdiction over a "regulatory mechanism" that was "specific, and limited" and "different in kind from regulatory mechanisms that do not involve pricing."[61]

43. At the first stage of the test, "the recognition of a matter of national concern must be based on evidence" that a proposed new matter "is of sufficient concern to Canada as a whole to

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[56] *GGPPA References* at paras 41-46, 80, 315-40, and 352-70
[57] *IAA*, Preamble and ss 22(1)(i) and 63(e); *Physical Activities Regulations*, Sch ss 30-33; Canada, *Discussion Paper on the Proposed Project List*, dated May 2019 at 10, also at Exhibit P to the Affidavit of Corinne Kristensen, Canada Appeal Record Vol 2-4, Tab 9
[58] *GGPPA References* at para 90
[59] *GGPPA References* at paras 120-124
[60] *GGPPA References* at para 123
[61] *GGPPA References* at para 175

warrant consideration under the doctrine."[62] Canada has not put forward evidence to demonstrate that every local work and undertaking that emits GHGs or other pollutants that can travel to another province is of concern to Canada as a whole such that federal authorities should be able to decide whether the work or undertaking is in the public interest.

44. At the second stage of the test, the proposed federal jurisdiction must be *qualitatively* different from matters of provincial concern and not an aggregate of provincial matters.[63] The majority held that "federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern."[64] As in the 2011 *Securities Reference*, however, the *Act* goes well beyond matters of undoubted national interest and permits federal authorities to regulate detailed aspects of local works and undertakings.[65] In many cases, it will also duplicate existing provincial environmental assessments. Deciding whether a local work or undertaking is generally in the public interest is therefore not qualitatively different from matters of provincial concern.

45. In the *GGPPA Reference*, this Court treated provincial inability as a necessary but not sufficient requirement to establish a new matter of national concern.[66] Yet Canada has not demonstrated that the provinces are incapable of assessing the environmental impacts of local works and undertakings. Local works and undertakings are, by their very nature, situated in a particular province. That province is perfectly capable of considering any GHG emissions or other pollution the project is expected to create through its own environmental assessment process and impose whatever mitigation measures are appropriate. Meanwhile, the national backstop on GHG pricing, upheld by this Court in the *GGPPA Reference,* protects the federal (indeed global) public interest implicated by human-induced climate change.

46. Even if there is a concern that one province may choose not to consider extra-provincial impacts in assessing a local project, there is no evidence that the wide range of projects potentially subject to the *Act* all pose the risk of "*grave* consequences for the residents of other provinces" needed to demonstrate provincial inability.[67] Under the *Act*, there is no minimum

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[62] *GGPPA References* at paras 133 and 142-44
[63] *GGPPA References* at paras 150-51
[64] *GGPPA References* at para 150
[65] *Reference re Securities Act*, 2011 SCC 66 at para 122 [*Securities Reference*]
[66] *GGPPA References* at paras 156-57
[67] *GGPPA References* at paras 153-55 [italics added]

level of emissions or potential risk of harm needed to trigger federal jurisdiction. A local work producing a small amount of relatively harmless interprovincial pollutants can still be designated if the federal government wishes to have the "final say" on whether it is in the public interest.

47. At the final step of the national concern analysis, Canada must show that the proposed matter has a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution." The purpose of the analysis is to prevent federal overreach. A new matter of national concern can only be justified if the impact on the interests that would be affected if Parliament cannot address a matter nationally outweigh the resulting intrusion upon provincial autonomy.[68] This Court found that the *GGPPA*'s scale of impact on provincial autonomy was qualified and limited, as the *GGPPA* is limited to the regulatory instrument of pricing and only acts as a backstop – it does not generally prescribe how provinces should combat climate change or regulate their local industries.[69]

48. By contrast, the *Act* confers a broad federal power to regulate any local project that may cause GHG emissions or other interprovincial pollution. Under the *Act*, Canada can: (1) prohibit or place conditions on *any* project that could give rise to GHG emissions whether or not the project has a significant impact on national or global GHG emissions; and (2) decide if such projects should proceed not just on environmental grounds but on the federal government's assessment of their public utility and socio-economic impact.

49. None of the constraints that led this Court to uphold the *GGPPA* are present here. The *Act*'s impact on the provinces' freedom to legislate is grave.[70] The federal government can prohibit local works and undertakings at the heart of the provinces' express constitutional jurisdiction, including projects undertaken by the provinces themselves. The *Act* is not restricted to establishing national pricing standards. Instead, federal decision makers are authorized to oversee a wide range of "areas of provincial life that would generally fall under provincial heads of power" and substitute their views of whether projects are in the public interest.[71] Finally, unlike the *GGPPA*, the *Act* gives federal decision makers "unfettered discretion to determine whether a

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[68] *GGPPA References* at paras 160-61
[69] *GGPPA References* at paras 196-206
[70] *GGPPA References* at paras 199-200
[71] *GGPPA References* at para 201

[designated local work or undertaking] is desirable."[72] In fact, that is its whole purpose.

50. This drastic reordering of the constitutional bargain could only be justified in dire circumstances. Yet Canada has failed to meet the "exacting" standard of showing *by evidence* that transferring to federal authorities oversight of local works and undertakings that might emit interprovincial pollutants is necessary to prevent grave extra-provincial consequences.[73]

c) The Criminal Law Power Cannot Be Used to Justify an Impact Assessment of Behaviour That Has Not Yet Been Prohibited

51. The criminal law power cannot be the jurisdictional basis to require an impact assessment of activity that is not yet prohibited. Parliament's criminal law power allows it to prohibit activity, not regulate it.[74] Where an activity has not been prohibited, Parliament has not yet exercised its criminal jurisdiction in relation to that activity. Nor is it open to the federal government to require an impact assessment to conduct a policy analysis of whether particular activities should be prohibited. Yet, the broad discretion under s. 9(1) of the *Act* for the Minister to designate projects that are not prescribed by the regulations under the *Act*, permits just this.[75]

52. For example, the federal Minister has designated Ontario's proposed Highway 413 on the basis that the project may have adverse impacts on the critical habitat of three species listed as endangered or threatened under *SARA*. *SARA*, however, only prohibits destruction of a listed species' critical habitat in a province that is not part of federal lands if the Governor in Council has made an order so specifying.[76] No such order has been made regarding the Western Chorus Frog or the Rapids Clubtail. Federal law does prohibit destroying residences of the third species, the Red-headed Woodpecker, but provincial law now provides broader protection as Ontario's

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[72] *GGPPA References* at para 202
[73] *GGPPA References* at paras 207-11
[74] While complex regulatory schemes have been upheld as valid exercises of Parliament's criminal law power, in every such case there was an underlying prohibition of activity being regulated, with complex exceptions: *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 45-61 and 150-51 [*Hydro-Québec*] and *Reference re Firearms Act*, [2000] 1 SCR 783 at paras 34-40 [*Firearms Reference*]. See also *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 at 50 [*Margarine Reference*].
[75] *IAA*, s 9(1)
[76] *SARA*, ss 33 , 58(4), 58(5.1), 61(2), and 80

Endangered Species Act prohibits damaging or destroying its habitat generally.[77]

53. Parliament has no general jurisdiction over wildlife. Rather, *SARA* designates federal species at risk pursuant to the federal criminal law power: s. 91(27). As noted above, however, and as IAAC itself recognized, the critical habitat of the three federally-listed species in question were not *all* generally protected under *SARA* at the time of designation.[78] As a result, the Minister has effectively asserted jurisdiction to require an environmental assessment based on, not only matters that Parliament has prohibited under its criminal law power, but also matters which Parliament *may at some time in the future* prohibit (i.e., critical habitat of federally-listed species on provincial land). Given that Parliament can prohibit virtually any activity so long as it has a criminal law purpose, if such a tenuous connection with federal jurisdiction were sufficient to ground a federal impact assessment, virtually any project could be so designated.

54. This Court has repeatedly emphasized that the criminal law power cannot be used to authorize such "colourable" intrusions upon provincial jurisdiction.[79] The *Act* is not comparable to the prohibition on releasing excessive amounts of PCBs into the environment under *Canadian Environmental Protection Act* (*CEPA*) and its regulations that this Court upheld in *Hydro-Québec*. The *Act* does not, as *CEPA* does, prohibit "specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances."[80] Rather, the *Act* prohibits any action from being taken on any designated project until federal decision makers determine that it is in the public interest writ large. That is precisely the kind of prohibition that this Court held is "so broad or all-encompassing as to be found to be, in pith and substance, really aimed at regulating an area falling within the provincial domain."[81]

C. The *Act* Impermissibly Allows Canada to Regulate All Aspects of a Designated Project, Not Just Those Linked to the Federal Head of Power that Triggered the Designation

55. Unlike the *Guidelines Order* this Court upheld in *Oldman River*, which only permitted examination of "matters directly related to the areas of federal responsibility affected," the *Act* is

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[77] *Endangered Species Act*, s 10
[78] IAAC Analysis Report at 8, Exhibit I to Liegler Affidavit, Vol I, Tab 2(I) at 15-16
[79] *Hydro-Québec* at paras 121-22; *Firearms Reference* at paras 18 and 53; *RJR MacDonald v Canada (Attorney General)*, [1995] 3 SCR 199 at para 28, citing *Margarine Reference* at 49-50; *R v Malmo-Levine*, 2003 SCC 74 at para 74, citing *Scowby v Glendinning*, [1986] 2 SCR 226 at 237
[80] *Hydro-Québec* at para 130
[81] *Hydro-Québec* at para 130

a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."[82] Parliament can determine whether projects over which it has constitutional jurisdiction are in the public interest. But it cannot and should not be permitted to substitute its view of the wisdom of local works and undertakings over the views of provincial authorities to whom the Constitution confers exclusive jurisdiction.

56. As Canada acknowledges, neither the environment nor environmental assessment are matters that fall within the constitutional division of powers. Rather, both levels of government may affect the environment, but only "in exercising their respective legislative powers" in accordance with the limits of each power.[83] As this Court held in *Hydro-Québec*, environmental provisions must be tied to their appropriate constitutional source: "Different types of legislative powers may support different types of environmental provisions. … There is a considerable difference between regulating works and activities, like railways, and a resource like fisheries."[84]

57. For example, when acting under its power to regulate fisheries, Parliament may only act if there is a demonstrated "actual or potential harm to fisheries."[85] Similarly, as the Federal Court has held, when acting under its power to protect migratory birds under an Imperial treaty Parliament must demonstrate a link with concern for migratory birds, not just their habitat.[86] In every case, Parliament's assertion of jurisdiction must be connected to a federal head of power.

58. Even when a project does have sufficient potential impact on a recognized federal head of power to permit Parliament to require a federal environmental assessment, that does not mean that Parliament can consider any factor it wishes in determining whether the proposal should proceed. The *Act* impermissibly gives federal decision makers the power to consider a wide range of socio-economic factors in determining whether to prohibit or impose conditions on projects that fall primarily within provincial jurisdiction, even when those factors are not directly linked to the federal heads of power on which a federal impact assessment was based.

59. Contrary to Canada's assertion that the triggers in the *Act* ensure the necessary proximity to

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[82] *Oldman River* at 71
[83] *Oldman River* at 63-64 and 67-68
[84] *Hydro-Québec* at para 114
[85] *Oldman River* at 67-68; *Fowler v The Queen*, [1980] 2 SCR 213
[86] *Hamilton-Wentworth (Regional Municipality of) v Canada (Minister of the Environment)*, 2001 FCT 381 at paras 163-77 [*Hamilton-Wentworth*], aff'd on other grounds 2001 FCA 347

matters within federal jurisdiction, the *Act* is not so limited. Rather, it allows federal decision makers to consider *any* change to the environment or to health, social or economic conditions, whether they have an impact on an area of federal responsibility or not. It allows federal decision makers to consider, and requires a proponent to provide information regarding, the purpose of or need for the project, any feasible alternatives, the extent to which the project contributes to "sustainability," comments received from the public, the intersection of sex and gender with other identity factors, and any other matter IAAC considers relevant.[87] A federal decision maker can then reject the project or impose conditions on it based on Canada's view of how it contributes to sustainability, Canada's climate change commitments, or even public perception.[88]

60. This Court has recognized that federal environmental assessment can only study effects that "may have an impact on the areas of federal responsibility affected." The *Guidelines Order* at issue in *Oldman River* was only *intra vires* Parliament because it required "that the social effects examined at the initial assessment stage be 'directly related' to the potential environmental effects of a proposal."[89] Parliament does not have a general power to assess the need for or potential alternatives to provincially-regulated projects absent environmental effects that are linked to a federal head of power.[90] A law that purports to do so is in pith and substance a law in relation to local undertakings, property and civil rights, or matters of a local concern.

61. Parliament is entitled to consider any factor it wishes when determining whether to approve an airport, an interprovincial railway, a military base, or nuclear power plant. But Canada is not entitled to use the pretext of considering a project's impacts on fisheries or migratory birds to consider the overall wisdom of an otherwise local work or undertaking.[91] Insofar as the *Act* allows federal decision makers to do so, it is *ultra vires* Parliament and should be read down.

62. In addition to including matters that do not themselves fall within federal jurisdiction, the *Act* requires a proponent to provide detailed information unrelated to any federal head of power. For example, proponents must explain how they intend to address issues raised by the public about the project (whether related to matters of federal jurisdiction or not). The requirement to provide such information can only be justified if necessary to support a federal decision-maker's

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[87] *IAA*, s 22(1)
[88] *IAA*, ss 60-64
[89] *Oldman River* at 72
[90] *Hamilton-Wentworth* at paras 178-81
[91] *Hamilton-Wentworth* at paras 163-177

ability to decide questions that fall within federal jurisdiction."[92] The *Act*, however, requires the proponents of all "designated projects" to provide a detailed description of *any* changes that might occur to the environment in another province or outside of Canada, an estimate of *any* GHG emissions associated with the project, and a description of *any* waste or emissions likely to be generated by the project regardless of whether that waste or emission is hazardous or has any impact on any matter Parliament has jurisdiction to regulate.[93]

63. To make matters worse, this voluminous information is required even before a decision regarding whether an impact assessment is warranted is made and no decision can be made until IAAC is "satisfied" the information provided is complete. The application of such requirements to projects that are not themselves within federal jurisdiction is *ultra vires* Parliament and again should be read down. That is particularly so where the federal government appears to have designated a number of physical activities as "designated projects" primarily because of policy disputes with the province(s) in which they are located.[94] For example, oil sands extraction facilities are only "designated projects" if the province in which they are located does not have a legislated hard cap on GHG emissions or has a cap that has been exceeded.[95]

64. In summary, the *Act* is an invalid, and indeed colourable, attempt to substitute Canada's views of whether local works and undertakings are desirable for those of the provinces in which the works are situated and over which the Constitution expressly grants jurisdiction. It should be struck down in its entirety or, at a minimum, read down to ensure that it is limited to gathering information to inform the proper exercise of Canada's existing regulatory powers.

PART IV – COSTS

65. As an intervener, Ontario does not seek costs and asks that no costs be awarded against it.

PART V – REQUEST FOR ORAL ARGUMENT

66. Ontario seeks an additional five (5) minutes to address its motion to adduce new evidence.

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[92] *Oldman River* at 73-76

[93] *IAA*, ss 10 and 15; *Information and Time Limits Regulations*, ss 3-4, Sch 1, ss 20, 23 and 24 and Sch 2, ss 20, 23 and 24

[94] *Physical Activities Regulations*, Sch ss 30-33; Canada, *Discussion Paper on the Proposed Project List* at 5 and 10-11, Exhibit P to the Affidavit of Corinne Kristensen, Canada Appeal Record Vol 2-4, Tab 9

[95] *Physical Activities Regulations*, Sch ss 32-33

PART VI – SUBMISSIONS ON PUBLICATION

N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF JANUARY 2023.

Josh Hunter

Yashoda Ranganathan

Counsel for the Intervener,
Attorney General of Ontario

PART VII – TABLE OF AUTHORITIES

Caselaw

Cases	**Paragraph(s) Reference**
Bell Canada v Québec (Commission de la santé et de la sécurité du travail), [1988] 1 SCR 749	30
Canadian Western Bank v Alberta, 2007 SCC 22	29, 31
Desgagnés Transport Inc v Wärtsilä Canada Inc, 2019 SCC 58	30
Devine v Quebec (Attorney General), [1988] 2 SCR 790	32
Fowler v The Queen, [1980] 2 SCR 213	54
Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3	3, 19, 28, 32, 52-54, 57, 59
Hamilton-Wentworth (Regional Municipality of) v Canada (Minister of the Environment), 2001 FCT 381, aff'd on other grounds 2001 FCA 347	54, 57-58
R v Hydro-Québec, [1997] 3 SCR 213	48, 51, 53
Interprovincial Co-operatives Ltd et al v R, [1976] 1 SCR 477	34, 35, 36
Reference re Firearms Act, [2000] 1 SCR 783	48, 51
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	18, 21, 30, 36-37, 39-44, 46-47
Reference re Securities Act, 2011 SCC 66	29, 41
Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] SCR 1	48, 51
R v Crown Zellerbach, [1988] 1 SCR 401	35, 36
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Statutes	**Paragraph(s) Reference**
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Physical Activities Regulations, SOR/2019-285 English: Sch, ss 30-33 Français: Annexe, ss 30-33	10, 38, 60
Species at Risk Act, SC 2002 c 29 English: ss 33 , 58, 61(2), and s. 80 Français: arts 33 , 58, 61(2), and s. 80	12, 49, 50
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***Information and Time Limits Regulations*, ss 3-4, Sch 1, ss 20, 23 and 24**

***Information and Time Limits Regulations*, ss 3-4, Sch 1, ss 20, 23 and 24**	***Règlement sur les renseignements et les délais*, art. 3-4, ann. 1, art. 20, 23 et 24**
20. A list of any changes to the environment that, as a result of the carrying out of the project, may occur on federal lands, in a province other than the province in which the project is proposed to be carried out or outside Canada. 23. An estimate of any greenhouse gas emissions associated with the project. 24. A list of the types of waste and emissions that are likely to be generated — in the air, in or on water and in or on land — during any phase of the project.	20. La liste de tous les changements à l'environnement qui, à la suite de la réalisation du projet, sont susceptibles de se produire sur le territoire domanial, dans une province autre que celle où le projet est proposé ou à l'étranger. 23. L'estimation de toute émission de gaz à effet de serre liée au projet. 24. La liste des types de déchets et d'émissions — dans l'air, l'eau et le sol — qui sont susceptibles d'être produits pendant toute étape du projet.

***Information and Time Limits Regulations*, ss 3-4, Sch 2, ss 20, 23 and 24**

***Information and Time Limits Regulations*, ss 3-4, Sch 2, ss 20, 23 and 24**	***Règlement sur les renseignements et les délais*, art. 3-4, ann. 2, art. 20, 23 et 24**
20. A description of any changes to the environment that, as a result of the carrying out of the project, may occur on federal lands, in a province other than the province in which the project is proposed to be carried out or outside Canada. 23. An estimate of any greenhouse gas emissions associated with the project. 24. A description of any waste and emissions that are likely to be generated — in the air, in or on water and in or on land — during any phase of the project and a description of the plan to manage them.	20. La description de tous les changements à l'environnement qui, à la suite de la réalisation du projet, sont susceptibles de se produire et d'affecter le territoire domanial, dans une province autre que celle où le projet est proposé ou à l'étranger. 23. L'estimation de toute émission de gaz à effet de serre liée au projet. 24. La description de tous les déchet et de toutes les émission — dans l'air, l'eau et le sol — qui sont susceptibles d'être produits pendant toute étape du projet et la description du plan de gestion des déchets et des émissions.

***Physical Activities Regulations,* Sch ss 30-33**

Physical Activities Regulations, Sch ss 30-33	***Règlement sur les activités physiques*, Ann art 30-33**
30. The construction, operation, decommissioning and abandonment of a new fossil fuel-fired power generating facility with a production capacity of 200 MW or more. 31. The expansion of an existing fossil fuel-fired power generating facility, if the expansion would result in an increase in production capacity of 50% or more and a total production capacity of 200 MW or more. 32. The construction, operation, decommissioning and abandonment of a new *in situ* oil sands extraction facility that has a bitumen production capacity of 2000 m^3/day or more and that is (a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province; or (b) within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province and that limit has been reached. 33. The expansion of an existing *in situ* oil sands extraction facility, if the expansion would result in an increase in bitumen production capacity of 50% or more and a total bitumen production capacity of 2000 m^3/day or more, if the facility is (a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province; or (b) within a province in which provincial	30. La construction, l'exploitation, la désaffectation et la fermeture d'une nouvelle installation de production d'énergie alimentée par un combustible fossile d'une capacité de production de 200 MW ou plus. 31. L'agrandissement d'une installation existante de production d'énergie alimentée par un combustible fossile qui entraînerait une augmentation de la capacité de production de 50 % ou plus et porterait sa capacité de production totale à 200 MW ou plus. 32. La construction, l'exploitation, la désaffectation et la fermeture d'une nouvelle installation d'extraction in situ de sables bitumineux d'une capacité de production de bitume de 2 000 m3/jour ou plus qui est, selon le cas : (a) ailleurs que dans une province où une limite des émissions de gaz à effet de serre pour les sites de sables bitumineux de la province est établie en vertu de la législation en vigueur de cette province; (b) dans une province où une telle limite ainsi établie a été atteinte. 33. L'agrandissement d'une installation d'extraction in situ existante de sables bitumineux qui entraînerait une augmentation de la capacité de production de bitume de 50 % ou plus et qui porterait la capacité de production totale de bitume à 2 000 m3/jour ou plus, lorsque l'installation est, selon le cas : (a) ailleurs que dans une province où une limite des émissions de gaz à effet de serre pour les sites de sables bitumineux de la province est établie

Physical Activities Regulations, Sch ss 30-33	***Règlement sur les activités physiques*, Ann art 30-33**
legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province and that limit has been reached.	en vertu de la législation en vigueur de cette province; (b) dans une province où une telle limite ainsi établie a été atteinte.