**SCC Court File No. 40195**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR 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

– and –

(Title of proceedings continued on next page)

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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## PART I. OVERVIEW

1. Never has Canada faced greater environmental peril: three interconnected threats, climate change, biodiversity loss, and pollution and waste, are inflicting severe damage in this country. These threats will not abate unless every government takes their responsibility to protect people and the environment seriously. The *Impact Assessment Act*[1] ("*IAA*" or "*Act*") responds to environmental threats where the federal government has legislative competence. The *IAA* may incidentally affect provinces, but that is both inevitable and constitutionally permissible.

2. Parliament is entitled to proceed on the basis that its enactments will be applied constitutionally. Evidence as to the effects of the legislation suggests that the *IAA* is applied constitutionally in practice. It is meant to, and does, ensure that impacts of projects in areas of federal jurisdiction are justified and mitigated. Safeguards in the *Act* prevent overreach: the significance of effects on areas of federal jurisdiction limits public interest determinations, reasons for decisions are mandatory, and judicial review is available. The *IAA* cannot be declared unconstitutional based on theoretical concerns or perceived inconvenience to provinces.

3. The Court below has described the *IAA* as a backdoor attempt to regulate greenhouse gas ("GHG") emissions. In fact, not only does Canada have jurisdiction to consider GHG emissions as a public interest factor in deciding to whether to approve projects, it has authority to regulate GHGs as a transboundary effect in s. 7(1)(b)(ii)-(iii) pursuant to the criminal law power.

## PART II. POSITION ON THE QUESTION ON APPEAL

4. The *IAA* and *Physical Activities Regulations*[2] ("*Regulations*") are constitutional in whole.

## PART III. ARGUMENT

### A. Canada's duty to address environmental crises

5. The constitutional issues arising in this Reference must be understood in the context of the scale of the environmental crises we face, this Court's recognition of the importance of environmental protection, the challenges of legislating to protect the environment, and the role of impact assessment in responding to environmental threats.

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[1] *Impact Assessment Act*, SC 2019, c 28, s 1 [***IAA***].
[2] *Physical Activities Regulations*, SOR/2019-285.

6. Climate change is an existential issue, as this Court recognized in *References re GGPPA*.[3] Canada has experienced 1.7°C of warming since 1948, roughly double the global average, and will continue warming at an above-average rate.[4] The Canadian arctic has already undergone significant reductions in sea ice, accelerated permafrost thaw and loss of glaciers, and Canada's coastline has experienced changes in sea level, rising water temperatures, increased ocean acidity and loss of sea ice and permafrost.[5] As global temperatures increase, Canada will continue to experience "particularly severe and devastating" effects on environment and human health.[6] Indigenous communities' very ways of life are threatened by climate change.[7]

7. The world is also experiencing a biodiversity crisis. The Federal Court of Appeal has recognized the "urgency to act to protect biodiversity", based on "scientific findings, each more alarming than the next" of sharp declines in global biodiversity indicators.[8] That Court has found that the depletion of "the life-sustaining systems of the biosphere…by human activity, no longer needs to be demonstrated, nor does the impact of this depletion on the quality of the environment."[9]

8. This Court, and the United Nations, have recognized pollution and waste as a third interconnected crisis that must be addressed to ensure a safe and liveable future.[10] As this Court stated as far back as 1995 in *Canadian Pacific*, "It is increasingly understood that…environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health."[11] The *IAA* provides an important framework for considering and addressing the complex interactions characterizing the "triple planetary crisis" of climate change, biodiversity loss, and pollution and waste, as they relate to matters within federal jurisdiction.[12]

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[3] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 167 [***References re GGPPA***].
[4] *References re GGPPA* at para 10
[5] *References re GGPPA* at para 11.
[6] *References re GGPPA* at para 10.
[7] *References re GGPPA* at para 11.
[8] *Groupe Maison Candiac Inc v Canada*, 2020 FCA 88 at para 41 [***Maison Candiac-FCA***].
[9] *Ibid* at para 53, citing *Groupe Maison Candiac Inc v Canada*, 2018 FC 643 at para 110 [***Maison Candiac-FC***].
[10] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55 [***Canadian Pacific***]; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1 [***Spraytech***]; *Proceedings of the United Nations Environment Assembly at its resumed fifth session*, UNEAOR, 5th Sess, UN Doc UNEP/EA.5/28 (5 March 2022) at 1-2, 14; *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, UNGAOR, 74th Sess, A/74/480 (7 October 2019); *The human right to a clean, healthy and sustainable environment*, UNGAOR, 76th Sess, UN Doc A/76/L.75 (26 July 2022) at 2.
[11] *Canadian Pacific* at para 55.
[12] Sara Seck et al, "Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: An Environmental Human Rights Toolbox for Government, Business, Civil Society, and Indigenous Groups"

9. Canada has not only the right to make robust use of its legislative powers to protect the environment from these threats – it has a duty to do so. This Court has on many occasions recognized environmental protection as "a public purpose of superordinate importance",[13] "a fundamental value in Canadian society"[14] and "one of the major challenges of our time".[15] In *Hydro-Québec*, Justice La Forest noted the "all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment"[16] (underline added).

10. The duty of which Justice La Forest spoke cannot be discharged without the tools in the *IAA*: "informed decision-making [through] early and smart integration of environmental, social and economic issues".[17] As stated in *Oldman River*, impact assessment "reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation" through "early identification and evaluation of all potential environmental consequences of a proposed undertaking".[18] This Court has also described environmental assessment essential because of "the serious problems that can result from anarchic development and use of land, in particular those problems concerning public health and the environment."[19]

11. Alberta's argument that a federal environmental assessment statute must be "auxiliary" to decision-making under other legislation is not supported by the case law,[20] and would undermine Canada's legitimate and important role in gathering information about the impacts of proposed projects to determine whether their adverse effects on areas of federal jurisdiction are justified, considering diverse public interest factors (environmental, social and economic) and potential mitigation.[21] Canada has a duty to protect against the adverse effects of any project that touches on its jurisdiction, because the division of powers determines the scope of federal power and responsibility,[22] not the existing exercise of federal powers under other legislation. The notion that

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(SSHRC Knowledge Synthesis Grant: Informing Best Practices in Environmental and Impact Assessments, April 2022) at 80, 83.

[13] *R v Hydro-Québec*, [1997] 3 SCR 213 at para 85 [***Hydro-Québec***].

[14] *Canadian Pacific* at para 55; *Spraytech* at para 1.

[15] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16 [***Oldman River***].

[16] *Hydro-Québec* at para 86.

[17] Maria Partidário, "Impact Assessment", *FastTips* no 1 (Fargo, ND: International Association for Impact Assessment, April 2012).

[18] *Oldman River* at 71.

[19] *R v Al Klippert Ltd.*, [1998] 1 SCR 737 at para 16.

[20] *Reference re Impact Assessment Act*, 2022 ABCA 165 at paras 671-683 (Greckol JA) [**ABCA Reasons**].

[21] *Oldman River* at 66, 75; See also *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 122-123.

[22] *Oldman River* at 69; ABCA Reasons at para 680 (Greckol JA).

"provincial projects" should be subject to more limited review than federal works and undertakings was also rejected in *Oldman River*.[23]

12. Both federal and provincial governments must make full use of their powers to protect the environment. Potential for overlap between federal and provincial interests in impact assessment is no reason for the federal government play a more limited role in this domain; rather it calls for coordination and collaboration between these levels of government, for which the *IAA* provides.[24]

### B. The *IAA* is a constitutional means to combat environmental crises

13. The *IAA* is far from a "profound threat" to federalism as Alberta (and the Court below) would have it. The only "threats" at issue are the environmental catastrophes the *IAA* plays a part in averting by, in pith and substance, establishing an environmental assessment process to safeguard against adverse environmental effects in relation to matters within federal jurisdiction. This matter is properly classified under the various enumerated powers, and the Peace Order and Good Government ("POGG") power.[25]

14. Evidence of the practical and legal effect of the legislation, provided by Ecojustice, supports Canada's characterization of it. Before the Court are decisions of the Minister of Environment and Climate Change, the Impact Assessment Agency of Canada, and the Governor in Council made under ss. 9, 16 and 60-65 of the *IAA*, and the parallel provisions of its predecessor, the *Canadian Environmental Assessment Act, 2012*[26] ("*CEAA 2012*"). *CEAA 2012* contained provisions nearly identical those Alberta impugns in the *IAA*: a "designation" provision allowing the Minister to require an assessment for a project not identified by regulation, a "screening" provision requiring the Agency to determine whether a project should undergo a full assessment, and "decision-making" provisions that inform whether a project is able to proceed and on what conditions.[27] Both statutes require that each decision consider the project's adverse federal, direct and incidental effects ("Adverse Federal Effects"), among other factors.[28]

15. "Designation" and "screening" decisions under *CEAA 2012* and the *IAA* demonstrate

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[23] *Oldman River* at 68.
[24] *IAA*, ss 21, 29, 31 and 39.
[25] Factum of the Attorney General of Canada at paras 120-142 [**AG Canada Factum**].
[26] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [***CEAA 2012***].
[27] *CEAA 2012*, ss 10, 14(2), 52-54; *IAA*, ss 9(1), 16, 60-65.
[28] *Ibid*. Note that *CEAA 2012* uses the term "environmental effects" (s 5) to encompass these effects.

careful attention to federal jurisdiction.[29] The Agency's reasons for requiring an impact assessment for projects under the *IAA* emphasize potential adverse effects on more than one area of federal jurisdiction.[30] Where the Minister or Agency required no assessment, it found that effects on federal jurisdiction would be limited or sufficiently managed.[31] "Decision-making" provisions are similarly restrained in scope and application: for the only Alberta project that has been subject to conditions under *CEAA 2012* or the *IAA*, conditions were closely tied to federal jurisdiction.[32]

16. Contrary to Alberta's submission, the purpose and effect of the *IAA* is not "comprehensive project regulation." Rather, the record shows that impact assessment decisions are consistently focused on effects within federal jurisdiction. The effects of the *IAA* are to consider all impacts and benefits of major projects that may impact federal jurisdiction, and to inform decisions about how address or mitigate any Adverse Federal Effects in view of the significance of those effects.[33]

17. Decisions under the *IAA*, including whether Adverse Federal Effects are in the public interest and whether conditions should be imposed in relation to them, will inevitably cause incidental effects on matters within provincial jurisdiction. However, as this Court has held, and as Alberta has recognized, incidental effects "may be of significant practical importance", as long as they are "collateral and secondary to the mandate of the enacting legislature".[34] Where conditions on projects touch on areas of provincial jurisdiction (or areas of shared jurisdiction) those conditions must be aimed at mitigating or offsetting Adverse Federal Effects. A rare decision that Adverse Federal Effects are not in the public interest may indeed put a halt to a project (although the proponent would be free to re-design it to avoid those effects). To the extent that such a decision impacts provincial jurisdiction, its impacts are incidental and allowable in our federation, provided that the decision is justifiably linked to significant Adverse Federal Effects.

18. Safeguards ensure the *IAA* focuses on *bona fide* Adverse Federal Effects: requirements to evaluate the significance of effects and give reasons, and the availability of judicial review.

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[29] Affidavit of Daniel Cheater, affirmed June 9, 2020, Tab A [**Cheater Affidavit**] (Appeal Record of the Attorney General of Canada Vol 11, Tab 17 **[AR]**).
[30] Cheater Affidavit, Tab A at 38-40 (Table 1) (AR, Vol 11, Tab 17). Adverse effects relate to fish, aquatic species, migratory birds and impacts on Indigenous peoples.

[31] Cheater Affidavit, Tab A at 40-63 (Tables 2 and 3) (AR, Vol 11, Tab 17).
[32] Cheater Affidavit, Tab C (AR, Vol 11, Tab 17). Conditions relate to fish and fish habitat, navigability, species at risk, migratory birds, Aboriginal traditional land uses and Aboriginal health.

[33] *IAA*, ss 22, 60-65.
[34] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 28.

19. **Significance:** Contrary to Alberta's assertion that there is no "materiality threshold" for the public interest determination,[35] the significance of Adverse Federal Effects is a central, mandatory factor in that determination. Impact assessment reports must explain the extent to which Adverse Federal Effects are significant.[36] The Minister or Governor in Council is then twice instructed to determine public interest in light of the significance of Adverse Federal Effects: they must make the determination "in light of the factors referred to in section 63 and the extent to which those effects are significant".[37] The factors in s. 63 again require the decision-maker to consider the extent to which the Adverse Federal Effects are significant".[38] The legislative choice to twice emphasize significance, at each mention of Adverse Federal Effects, must be given meaning – Parliament intended "significance" to be a limit on the exercise of discretion under the *IAA*.

20. **Reasons:** Unlike its predecessor statutes, the *IAA* contains a statutory requirement for federal authorities to justify their decisions with reasons.[39] Those reasons must explain the determination of the significance of Adverse Federal Effects, and how they relate to the public interest determination. In the event of a decision that effects are not in the public interest, the reasons would have to justify the decision with regard to relevant facts, including the extent to which the effects are so significant as to be outside the public interest.[40]

21. **Judicial Review:** Any decision under the *IAA* alleged to exceed jurisdiction may be subject to judicial review.[41] Such a dispute should be decided with facts, with the standard of review derived from this Court's decision in *Vavilov*.[42] Some decisions already have been challenged, including designation decisions.[43] This Reference should not circumvent judicial review based on a *lis* between parties that does not involve proving the *IAA* is applied unconstitutionally in fact.

22. The mere possibility, contrary to these safeguards and contrary the evidence of the statute's constitutional operation, that the *IAA* will cause effects that are more than collateral or secondary

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[35] Factum of the Attorney General of Alberta at para 99; see also ABCA Reasons at paras 367, 370.
[36] *IAA*, s 28(3).
[37] *IAA*, s 60(1), 61(1).
[38] *IAA*, s 63(b).
[39] *IAA*, s 65(2).
[40] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 99, 102-107 [***Vavilov***].
[41] *References re GGPPA* at paras 73, 75-76, 88; AG Canada Factum at paras 72-74; Donald JM Brown & The Honourable John M Evans with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada*, (Toronto: Thomson Reuters, 1998) (loose-leaf revision 2019-4) at 13:1210 "Limited Nature of Grants of Authority: Constitutional Limits" (Intervener's Book of Authorities, Tab 1 [**IBOA**]).
[42] *Vavilov*.
[43] See e.g.: *Canada v Ermineskin Cree Nation*, 2022 FCA 123; *Ecology Action Centre v Canada*, 2021 FC 1367.

to its purpose is not sufficient to render the statute unconstitutional. Parliamentary enactments benefit from a presumption of constitutionality,[44] and regulations benefit from a similar presumption that their authority intended to respect jurisdictional limits.[45] Administrative decision-makers are equally required to make decisions in a manner that respects constitutional limits,[46] and Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service."[47] In other words, one does not strike down a statute simply because of a concern that it *could* be applied unconstitutionally.[48]

### C. The *IAA* constitutionally exercises federal jurisdiction over GHG emissions

23. In the face of climate crisis, it is not only constitutional but also necessary that the federal government consider climate change when making decisions during impact assessment. Contrary to the conclusions of the Court below,[49] there is ample constitutional basis for federal assessment of GHG emissions from major projects.

24. It is within the federal government's purview to consider GHG emissions and climate change as a factor in deciding whether impacts on areas within federal jurisdiction are in the public interest, and to place conditions on GHG emissions as a trade-off for allowing effects on areas of federal jurisdiction. GHGs are not an exclusive area of federal or provincial jurisdiction, and Canada is not precluded from considering GHGs at the various stages of impact assessment.[50] The *Regulations* narrow the scope of the *IAA* by limiting impact assessment requirements to major projects with the greatest potential to cause adverse effects in areas within federal jurisdiction,[51]

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[44] *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 28.
[45] *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 25; *Heppner v Alberta (Environment, Minister)*, 1977 ALTASCAD 206 at para 30.
[46] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, at 1078 [***Slaight Communications***]; *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, at para 3; *Brown v Canada*, 2020 FCA 130 at para 78 [***Brown***]; Robert W Macaulay & James LH Sprague, *Practice and Procedure Before Administrative Tribunals*, ed by Lorne Sossin (Toronto: Carswell, 2019) (2020-4 update) at 5B.3(a) "Presumption in a Grant of Discretion" (IBOA, Tab 2).
[47] *Little Sisters Book and Art Emporium v Canada (AG)*, 2000 SCC 69 at para 71; Paul Daly, "Presumptions of Constitutionality in Canada" (2 December 2021), *Paul Daly: Administrative Law Matters* (blog), online: <https://www.administrativelawmatters.com/blog/2021/12/02/presumptions-of-constitutionality-in-canada/>.
[48] *Ibid*. See also: *Slaight Communications* at 1078; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 114; *Brown* at para 78.
[49] *Reference re Impact Assessment Act*, 2022 ABCA 165 at paras 288-291 [**ABCA Reasons**].
[50] *References re GGPPA* at para 125.
[51] Physical Activities Regulations: Regulatory Impact Analysis Statement, (2019) C Gaz II, Vol 153, No 17, 5661 at 5661 and 5663. In contrast, the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 (Appellant's Book of Authorities, Tab 2) and *Canadian Environmental Assessment Act*, SC 1992, c 37 required all projects involving a federal decision-making responsibility and certain other roles to undergo some level of review.

and it is permissible for Canada to consider GHGs in developing the project list.

25. In addition, the federal government has direct authority to regulate GHGs under its criminal law jurisdiction provided in s. 91(27) of the *Constitution Act, 1867*. The Federal Court of Appeal has held that "is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power".[52] Relying on the criminal law power, the federal government has listed GHGs as "toxic substances" under the *Canadian Environmental Protection Act* ("*CEPA*")[53] and has adopted numerous regulations of GHG emissions under that statute, including regulations targeting GHG emissions from specific industries or projects that meet certain thresholds.[54] These include regulations prescribing consumer fuel content, imposing methane limits for the upstream oil and gas sector, and implementing Canada's phase out of coal-fired electricity generation.[55]

26. Canada not only has authority to consider GHGs as a public interest factor under the *IAA*, but also, under the criminal law power, to assess and, where required, regulate, GHGs as a transboundary effect in s. 7(1)(b)(ii)-(iii). This is consistent with the existing role the federal government plays in regulating GHG emissions under the criminal law power and would promote informed and coherent federal planning on GHG emissions within its proper jurisdictional remit.

27. The *Canadian Net-Zero Emissions Accountability Act* requires the federal government to achieve defined national GHG emissions reductions every five years until 2050, by when Canada has committed to achieve net zero GHG emissions.[56] The criminal law power (relied on in *CEPA*) and the POGG power (relied on in the *Greenhouse Gas Pollution Pricing Act*[57] ("*GGPPA*")) are the jurisdictional levers the federal government uses to achieve those reductions. Federal jurisdiction related to GHGs in the *IAA* ensures consistency in federal decision-making with respect to new projects (regulated under the *IAA*) and existing projects (regulated under statutes such as *CEPA* and the *GGPPA*) to ensure Canada meets its climate commitments.

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[52] *Syncrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 at para 62 [***Syncrude***].
[53] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33; *Order Adding Toxic Substances to Schedule 1 to the Canadian Environmental Protection Act, 1999*, SOR/2005-345, C Gaz II, Vol 139, No 24, 2626.
[54] See e.g. *Regulations Limiting Carbon Dioxide Emissions from Natural Gas-fired Generation of Electricity*, SOR/2018-261, s 3-4 (specifying carbon dioxide intensities that apply to boiler units and combustion engine units that have a capacity of 25MW or more for which more than 30% of heat input comes from natural gas).
[55] *Renewable Fuels Regulations*, SOR/2010-189; *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector*, SOR/2018-66; *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167.
[56] *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22, ss 6-7.
[57] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

28. Section 7, and the related prohibition against contravening conditions in s. 144(1)(b), meet the requirements to be upheld under the federal criminal law power: (1) a valid criminal law purpose, backed by (2) a prohibition and (3) a penalty.[58] These three conditions are all that is required for the exercise of the criminal law power and the Court must be neutral as to means by which a valid criminal law purpose is pursued.[59] Criminal law may provide for exemptions, including by allowing provinces to fulfill the purposes underlying the scheme.[60] Parliament may delegate to the executive the power to specify conduct that has, or is exempt from, criminal consequences.[61] A criminal law scheme may also provide administrative decision-makers discretion to determine whether a criminal law prohibition applies in a particular context or not.[62]

29. Sections 7 and 144(1)(b) of the *IAA* have a valid criminal law purpose: prohibiting carrying out designated projects that cause adverse effects within federal jurisdiction without assessment and prescribed mitigation of environmental harm. Unmitigated environmental harm in defined areas of federal jurisdiction is the criminal law "evil" that these sections "wishes by penal prohibition to suppress".[63] In *Hydro-Québec*, this Court recognized environmental protection as a "wholly legitimate public objective in the exercise of the criminal law power".[64]

30. Section 7 and 144(1)(b) contain prohibitions which are backed up by penalties set out in s. 144(2)-(4), including fines of up to $4 million for a first offense.[65] The majority of the Court of Appeal agreed that s. 7 contained a prohibition backed up by a penalty, but found that the criminal law purpose requirement was not met because this section "is not limited to protecting against objectively 'harmful effects'"[66] and was vague and/or overbroad.[67]

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[58] *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 27 [***Firearms Reference***]; *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 35 and 119 [***Hydro-Québec***]; *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 28 [***RJR-MacDonald***].
[59] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 85 [***AHRA Reference***]; *Syncrude* at para 85; RJR-MacDonald at para 51.
[60] *RJR-MacDonald* at paras 52-57; *Hydro-Québec* at para 153; *R v Furtney*, [1991] 3 SCR 89 at para 39.
[61] *Hydro-Québec* at paras 130, 150 and 152; *Maison Candiac-FCA* at paras 22 and 143.
[62] *Firearms Reference* at para 37; *Maison Candiac-FCA* at para 22.
[63] *Hydro-Québec* at para 119.
[64] *Ibid* at para 132. See also: *ibid* at para 123; *Syncrude* at para 62; *Maison Candiac-FCA* at paras 52-53; *Maison Candiac-FC* at paras 110, 114-116, 118; ABCA Reasons at para 404 (Fraser CJ).
[65] *IAA*, ss 7, 144(2), (3), (4).
[66] ABCA Reasons at para 405 (Fraser CJ).
[67] *Ibid*.

31. Contrary to the reasons of the Court of Appeal, there is no requirement for criminal law prohibitions to focus on proven harmful effects.[68] *Hydro-Québec* concerned provisions of *CEPA* that allowed the federal executive to regulate toxic substances "entering or [that] may enter the environment" and "may have [a] harmful effect on the environment…" (underline added), which it upheld under the criminal law.[69] Justice La Forest found that "broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject" and that such legislation "should not be approached with the same rigour…in applying the doctrine of vagueness".[70] At the same time, "making provision for carefully tailoring the prohibited action to…specific circumstances" is "obviously necessary" in environmental legislation.[71] Similarly, the Federal Court of Appeal upheld under the criminal law provisions allowing the federal executive to issue highly individualized orders protecting species-at-risk.[72]

32. The *IAA* likewise tailors the broad prohibition in s. 7(1)(a) to a narrow prohibition, or no prohibition, when the impact assessment is completed or the Agency decides that no impact assessment is required. At the end of an impact assessment, a proponent is only prohibited from breaching the conditions issued under s. 7(3)(b) and 144(1)(b). Such tailoring consistent with the use of the criminal law power under *CEPA* and the *Species at Risk Act*.[73]

### D. Conclusion

33. The *IAA* provides a necessary and unifying federal legislative response to the environmental crises of our time, tailored to Parliament's jurisdiction and safeguarded against overreach. Federal assessment and regulation of GHGs as a transboundary impact under the *IAA* is consistent with the established federal role under the criminal law. While incidental effects on provinces are inevitable, that is no constitutional infirmity. It is certainly no reason for this Court to deny Canadians and the Canadian environment the federal government's essential role in environmental protection.

## PART IV. REQUEST TO PRESENT ORAL ARGUMENT

34. Ecojustice requests leave to present oral arguments at the hearing of this appeal.

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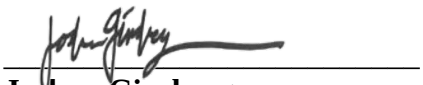
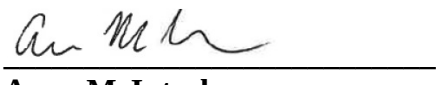
[68] *Hydro-Québec*; *AHRA Reference* at para 56; *Syncrude* at para 75.
[69] *Hydro-Québec* at paras 102 and 133.
[70] *Hydro-Québec* at para 134, citing Gonthier J in *Canadian Pacific*.
[71] *Hydro-Québec* at para 151.
[72] *Maison Candiac-FCA* at paras 22, 65-67.
[73] *Species at Risk Act*, SC 2002, c 29; *Hydro-Québec*; *Maison Candiac-FCA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2022.



**Joshua Ginsberg**



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## PART V. TABLE OF AUTHORITIES

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| 17. | *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 | 8, 9, 31 |
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