SCC File Number: 40195

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

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

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

BETWEEN:

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Appellant

- and –

ATTORNEY GENERAL OF ALBERTA

Respondent

- and –

(Title of proceedings continued on next page)

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I. PART I – OVERVIEW

1. The interveners supporting Canada ("***IAA* Interveners**") propose numerous ways to validate the *Impact Assessment Act*.[1] In addition to arguing for classification under various heads of federal power under the *Constitution Act, 1867*,[2] most notably section 91(24), the *IAA* Interveners appeal to, *inter alia*, concepts of cooperative federalism, and the complexity of the shared responsibility over the environment in hopes of sustaining the *IAA*. Others support the *vires* of the *IAA* on the basis of policy preferences, or suggestions of new areas of federal jurisdiction. None of these arguments, however, can diminish the fundamental nature of the *IAA* as an overreach of federal jurisdiction, with severe implications for areas of provincial responsibility and, indeed, federalism itself.

2. Throughout their submissions before this Court, the *IAA* Interveners understate the breadth of the powers conferred on the federal executive and the Impact Assessment Agency of Canada (the "**Agency**") by the *IAA*, equating the *IAA*'s provisions to those of previous auxiliary assessment regimes. The *IAA* Interveners mischaracterize this Court's decision in *Oldman River*,[3] which clarified Parliament's constitutional authority to subject local works to impact assessment. The *IAA* Interveners further inaccurately portray other decisions concerning the *EARPGO*[4] and *CEAA, 1992*,[5] both in terms of when federal environmental impact assessment is properly engaged and the scope of considerations that may be taken into account.

3. The fundamental constitutional defect of the *IAA* flows from a faulty conceptualization of the scope of Parliament's legislative competence based on "effects within federal jurisdiction". In enacting the *IAA*, Parliament failed to respect not only the division of powers, but also the limits placed on the exercise of Parliament's powers by the ancillary and incidental effects doctrines, when ostensibly legislating with respect to effects within federal jurisdiction. Enumerating all of the heads of power under which Parliament may legitimately address environmental or other concerns and proposing those heads of power as the source of Parliament's authority to enact the

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[1] *Impact Assessment Act*, SC 2019, c 28 [***IAA***].
[2] *Constitution Act, 1867*, 30 & 31Victoria, c 3 (UK).
[3] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 [***Oldman River***].
[4] *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467.
[5] *Canadian Environmental Assessment Act*, SC 1992, c 37.

IAA does not avoid the *IAA*'s unrestrained encroachment on provincial powers – an encroachment that renders it *ultra vires*.

II. PART II – ARGUMENT

A. Federalism

1. Complexity and Democratic Accountability Are Not Federal Heads of Power

4. World Wildlife Fund Canada ("**WWF**") argues that the inherent complexity of the environment, and the purported role that democratic accountability plays in modern environmental law, anchors the *IAA* in several heads of federal power.[6] These concepts, however important, do not affect the division of powers so as to justify the enhancement of federal authority under the *IAA*. Indeed, this Court has identified democratic accountability as a key factor supporting a robust approach to federalism.[7]

5. WWF goes to great lengths to emphasize the citizenry's participation in both provincial and federal legislative spheres, and the autonomous nature of the levels of government,[8] but ignores that the *IAA* has the power to subjugate provincial jurisdiction through the concept of "effects within federal jurisdiction", even where those effects are insignificant and adequately addressed by provincial assessment regimes. The *IAA* emphasizes federal participation at the expense and restriction of provincial participation.

6. WWF goes so far as to describe natural resources as a "subset" of the environment,[9] seemingly in an effort to more effectively invoke the language used in *Oldman River* and argue that natural resources are a "constitutionally abstruse matter". Section 92A of the Constitution clearly delineates natural resources, not as a subset of the environment, but as its own, standalone area of provincial jurisdiction.

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[6] Factum of World Wildlife Fund Canada at para 3 [**WWF Factum**].
[7] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 22, 45 [***Canadian Western Bank***].
[8] WWF Factum at paras 13-16.
[9] *Ibid* at para 14.

7. The environment is undoubtedly complex and a matter of concern to all Canadians, as are many other complex matters that must be addressed by government. However, Parliament and the legislatures must act *within their own spheres*, and through real, not coerced, cooperation, to collectively address these issues. Contrary to this principle, the *IAA* provides for the overriding of provincial jurisdiction on nothing more than *a promise to consider* provincial input;[10] such a framework reflects neither coordination nor cooperation.

2. Cooperative Federalism Cannot Make the *IAA* Constitutional

8. The *IAA* Interveners rely heavily on cooperative federalism to justify the *IAA*'s overreach. The joint factum of Nature Canada and the West Coast Environmental Law Association asserts that Alberta's interpretation of federalism and the *IAA* would erode Parliament's ability to enact environmental assessment laws so extensively as to undermine the description of federalism in *Canadian Western Bank*.[11] But, it is the *IAA*'s overreach, including its usurpation of decision making over certain provincially regulated activities, that undermines a robust approach to federalism. Even the Attorney General for British Columbia, which expresses some support for the *IAA*, highlights that to the extent that the *IAA* allows the federal government to determine whether a provincial undertaking that causes federal effects is in the overall public interest, it is *ultra vires* Parliament.[12]

9. Federalism has been described as "the lodestar by which the courts have been guided".[13] Cooperative federalism is a part of the federalism principle, but it has its limits. It supports, rather than supplants or modifies, the division of powers.[14] This Court stated in the *2011 Securities Reference* that "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state".[15] Cooperative federalism cannot be used to make an otherwise unconstitutional law

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[10] *IAA*, ss 15, 21-22.

[11] Factum of Nature Canada and West Coast Environmental Law Association at paras 21-23 [**Nature Canada Factum**].

[12] Factum of the Attorney General of British Columbia at paras 56-58.

[13] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 56.

[14] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 50 [***GGPPA Reference***].

[15] *Reference re Securities Act*, 2011 SCC 66 at para 62 [***2011 Securities Reference***].

a valid one.[16] Nor to mandate cooperation where the division of powers authorizes one level of government to act unilaterally.[17]

10. This Court has encouraged the enactment of legislation by both levels of government to address complex issues that cannot be allocated to a single or specific head of power,[18] with the underlying presumption being that both pieces of legislation could effectively operate in tandem to address matters within the respective jurisdiction of the provincial and federal governments. The *IAA*, however, renders provincial legislation subordinate, including in relation to decisions in respect of matters of exclusive provincial jurisdiction, like local works. This is the case whether it is the Agency, a joint review panel or a provincial regulator (where substitution is approved under section 31 of the *IAA*) conducting the impact assessment. In her dissent, Greckol J acknowledged this, noting "[u]nder the *IAA*, even if a different jurisdiction carries out the impact assessment, it appears that there will always be a federal decision to approve or deny the project".[19] A legislative process that purports to facilitate cooperation with the provinces, while at the same time vesting the final decision-making power in a federal body, does not reflect cooperative federalism.

3. The *IAA* Interveners Misstate the Case Law in Respect of *EARPGO* and the *CEAA*

(a) The Case Law Relied Upon by the *IAA* Interveners Does Not Support Unlimited Federal Review of Intra-Provincial Projects

11. Several of the *IAA* Interveners argue that the applicable case law supports broad review of intra-provincial projects any time any federal matter is potentially impacted. Alberta rejects this interpretation of the authorities. Importantly, each of the decisions relied upon by the *IAA* Interveners involved activities that required a decision under existing federal legislation (e.g. the

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[16] *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 39.
[17] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 25 [***Genetic Non-Discrimination***].
[18] *2011 Securities Reference* at paras 57-62; *Canadian Western Bank* at para 37; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 62-64.
[19] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 718, per Greckol J (in dissent) [***ABCA Reasons***]

Fisheries Act).[20] There is no such prerequisite under the *IAA*, which is triggered merely on the basis of an activity being a designated project, regardless of whether there is a federal decision-making function independent of the *IAA* itself. The arguments advanced by the *IAA* Interveners in this regard ignore the clear statement of La Forest J. that "[i]t cannot have been intended that the *Guidelines Order* would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction".[21]

12. Moreover, this Court in *Oldman River* was satisfied that the *EARPGO* did not constitute a Trojan Horse given its auxiliary nature and the proximity of the assessment to the subject matter of the federal jurisdiction involved. This Court was clear that federal assessment must at all times be limited to areas of federal jurisdiction and that the nature and extent of such assessment varies depending on the specific federal power at issue:

> It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities.[22]

13. Yet the *IAA* treats all projects listed in the *Physical Activities Regulations*[23] the same way: as if they were federal works and undertakings. That is constitutionally impermissible.

(b) The *IAA*'s Application is Broader than the *EARPGO* and *CEAA, 1992*

14. Certain *IAA* Interveners suggest that the *IAA's* definition of "effects within federal jurisdiction" creates a "legal nexus" between the *IAA* and specific areas of federal jurisdiction that

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[20] See e.g. Factum of the Canadian Environmental Law Association, Environmental Defence, Miningwatch Canada [**CELA Factum**], referencing *Oldman River*; *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322, 156 DLR (4th); *Quebec (Attorney General) v Moses*, 2010 SCC 17; and *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at para 7 [***MiningWatch***].

[21] *Oldman River* at 47.

[22] *Ibid* at 67.

[23] *Physical Activities Regulations*, SOR/2019-285.

is "considerably" narrower than the *EARPGO*.[24] However, the *EARPGO* and the *CEAA, 1992* were each limited to four types of federal decision-making, tied to heads of federal jurisdiction. An environmental assessment was required to inform those decision-making functions which were typically limited to only an aspect of an intra-provincial project (e.g. a *Fisheries Act* authorization for a bridge). The *EARPGO* and the *CEAA, 1992* did not stop or prohibit other aspects of the larger intra-provincial project that were not related to federal decision-making from being approved by the province and advanced by the proponent.

15. By contrast, the *IAA* is engaged merely by a project being listed in the *Regulations* or through designation by the Minister under section 9. Once listed or designated, essentially all acts or things in connection with the entire designated project are prohibited by virtue of section 7 and the broad definition of "effects within federal jurisdiction". Alberta agrees with Nature Canada that it may not be until the "decision-making phase" of the *IAA* that "the Minister or the Governor-in-Council (as the case may be) will know whether and to what extent the designated project will affect federal matters."[25] This could be years after the impact assessment process is triggered. In the meantime, the proponent's rights would be very much affected by the imposition of a statutory stay pursuant to section 7 of the *IAA*, while the federal government determines if, and to what extent, it has jurisdiction over any aspect of the project.

16. Further, unlike the *EARPGO* and the *CEAA, 1992*, there is no process within the *IAA* to scope the project in a manner that is appropriately limited to a specific federal function. The entire activity as listed in the *Regulations*, as well as "any physical activity that is incidental to"[26] those activities, must be addressed from beginning to end. Thus a "legal nexus" between the *IAA* and the designated project (or at the very least significant aspects of the designated project) need not exist,

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[24] CELA Factum at para 15.
[25] Nature Canada Factum at para 8.
[26] *IAA*, s 2, definition of "designated project".

resulting in listed local works and undertakings effectively being regulated by the federal government under the *IAA* as if they were federal works and undertakings.

(c) The Auxiliary Nature of the *EARPGO* was Fundamental to its Constitutional Validity

17. Ecojustice suggests that the "auxiliary" nature of the *EARPGO* was not a fundamental aspect of this Court's decision in *Oldman River* and that there is no constitutional reason that provincial projects should be of a more limited federal review than federal works and undertakings.[27] This Court in *Oldman River* was, however, clear that the exercise of environmental jurisdiction must be tied to a head of power under the division of powers:

> Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction": see *Devine v. Quebec (Attorney General),* [1988] 2 S.C.R. 790, at p. 808. Given the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of power invoked in each instance.[28]

18. The *IAA* is not auxiliary in nature and lacks the requisite proximity and connection to federal jurisdiction.

(d) It is Not Open for Federal Decision Makers in All Cases to Take All Matters into Account When Exercising a Decision-Making Function

19. Nature Canada argues that in cases where the *IAA* is tied to a federal decision-making function (i.e. where "direct or incidental effects" are being considered under section 8 of the *IAA*), the federal authority may consider *all matters* when deciding whether federal effects are in the public interest.[29] However, as was stated by the Alberta Court of Appeal, "[t]he federal government's power to deny a federal permit must be exercised for the right reasons. A denial must be based on the effects of the intra-provincial designated project on the federal head of power

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[27] Factum of Ecojustice Canada Society at para 11 [**Ecojustice Factum**].
[28] *Oldman River* at 72
[29] Nature Canada Factum at paras 13-15.

engaged, not on a negative public interest determination grounded in factors and considerations untethered to the head of power".[30]

20. Similarly, Nature Canada argues that in making a public interest determination under the *IAA*, consideration may be given to "all relevant factors, so long as the decision is not colourable and is made in good faith".[31] But this position assumes the underlying validity of the *IAA*. The breadth of listed factors in the *IAA*, and a public interest test that extends well beyond areas of federal jurisdiction, however, support the concern over the jurisdictional overreach in the statute, and thus the invalidity of the *IAA*. This is in addition to the flawed premise advanced by Nature Canada, that the federal government is entitled to make public interest determinations to approve or deny all designated projects, including local works. The case law does not support Canada's constitutional authority to do so and the factors considered in any such determination are arguably irrelevant.

21. The arguments advanced by the *IAA* Interveners highlight one of the problematic licensing aspects of the *IAA*. Through section 8 (and independent of section 7), the *IAA* essentially becomes the decision-making and licensing legislation for all federal powers, duties and functions that would permit the designated project to be carried out in whole or in part. If the public interest determination under the *IAA* is negative, then no federal authorizations can be issued in respect of the project, regardless of whether the reasons for the negative decision are tied to any federal head of power or even to the specific federal head of power under which an authorization is required (e.g. the *Fisheries Act*). Such a result is contrary to *Oldman River*.

(e) ***MiningWatch*** was Merely a Decision Involving Statutory Interpretation

22. Nature Canada argues that *MiningWatch* confirmed that "the scope of the project to be assessed federally must include all proposed components and activities."[32] Four important aspects in respect of *MiningWatch* are not acknowledged in the Nature Canada factum: (1) the project at issue in *MiningWatch* required independent authorizations (i.e. decision-making under valid

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[30] *ABCA Reasons* at para 341.
[31] Nature Canada Factum at para 17.
[32] *Ibid* at para 11.

federal legislation in respect of the project) under the *Fisheries Act* and the *Explosives Act*, thus validly triggering the application of the *CEAA, 1992* by virtue of these authorizations being listed in the *Law List Regulation*; (2) the case law leading up to the decision in *MiningWatch* supported federal environmental assessment focused on federal decision-making; (3) *MiningWatch* was entirely a statutory interpretation case – the word "Constitution" is not mentioned in the decision; and (4) the statutory provision at issue was amended by Parliament shortly after the decision was issued, returning it to its pre-*MiningWatch* intent.

23. The case law involving *CEAA, 1992* leading up to *MiningWatch* is instructive as it supported a scoping of projects to federal decision-making functions.[33]

24. Ultimately, *MiningWatch* did not address any constitutional issue, as there was no division of powers concern. *MiningWatch* was clearly and entirely a statutory interpretation case involving section 21 of the *CEAA, 1992*, which was amended after the decision to return the discretion to scope the project back to what was found to be valid in the prior decisions.

B. Classification

1. Substantive Federal Heads of Power

(a) The *IAA* Cannot be Supported by Sections 91(24) or 35

25. Several of the *IAA* Interveners, including the Mikisew Cree First Nation ("**Mikisew Cree**"), the First Nations Major Projects Coalition, the File Hills Qu'Appelle Tribal Council and the Pasqua First Nation, and the Lummi First Nation, argue that the *IAA* can be supported using section 91(24) of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982*.[34]

26. In advancing these positions, the *IAA* Interveners understate the powers afforded to Canada under the *IAA*. Mikisew Cree states that the "Indigenous Effects Provisions enable the federal

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[33] *Manitoba's Future Forest Alliance v Canada (Minister of the Environment)*, [1999] FCJ No 903 (TD), 170 FTR 161; *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263, 1999 CanLII 9379 (FCA); *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265; *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31.

[34] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

government to consider, address, and/or avoid impacts from designated projects on Indigenous Interests."[35] But the provisions enable Canada to do far more than that.

27. The example provided at paragraphs 132-133 of Alberta's Factum, which Mikisew Cree characterizes as *in terrorem* and an example of Canada "unreasonably" blocking a project under the *IAA,* demonstrates this. Where a physical activity – like constructing and operating an electricity generation facility – is designated in the *Regulations,* it is automatically stayed by virtue of section 7.[36] That is, a proponent of such a project is prohibited from doing anything in connection with the carrying out of the project, including causing effects to Indigenous peoples, until certain decisions are made under the *IAA.* This is the case even where the proponent has obtained all relevant provincial approvals.[37] The application of the stay to a designated project is automatic and requires no exercise of federal discretion or statutory decision-making – that is how the *IAA* operates.

28. From there, because the effects of a designated project on Indigenous peoples are defined as "effects within federal jurisdiction", the *IAA* would apply to a designated project through all stages of the process, including justifying an impact assessment at the section 16 stage, justifying a denial of the project at the public interest decision stage or attracting federal conditions.

29. Alberta's simple example shows the true nature of the *IAA.* Despite its references in part to Indigenous interests and rights, the *IAA* is not in pith and substance directed at matters falling within the scope of section 91(24).[38] It is not legislation in relation to aspects of "Aboriginal life".[39] Rather, the *IAA* is about regulating physical activities. It leverages concepts of federal heads of power including, but not limited to, section 91(24), as a purported foundation for a standalone

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[35] The Factum of the Mikisew Cree First Nation at para 7 [**Mikisew Cree Factum**]. Mikisew Cree defines "Indigenous Effects Provisions" as ss 7(1)(c) and (d) and ss (c) and (d) of the definition of "effects within federal jurisdiction".

[36] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758.

[37] Factum of the Business Council of Alberta at para 24.

[38] *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31.

[39] Mikisew Cree Factum at para 9.

federal decision-making regime that allows Canada to regulate "Canada's major projects",[40] regardless of whether such projects are local works and undertakings, non-renewable natural resource projects, electricity generation facilities or other activities over which the provinces have exclusive legislative jurisdiction. This includes the regulatory power to determine whether such projects are permitted to proceed at all.

30. This Court concluded in *Grassy Narrows* that "[s]ection 91(24) does not give Canada the authority to take up provincial land for exclusively provincial purposes, such as forestry, mining, or settlement. Thus, s. 91(24) does not require Ontario to obtain federal approval before it can take up land under Treaty 3."[41] Section 91(24) also does not provide Canada with the authority to regulate (prohibit, assess and deny) a local work or undertaking, non-renewable natural resource project or electricity generation facility based only on the apprehension of impacts on Indigenous people.

31. Powers to legislate with respect to the foregoing works *qua* works, which encompass many of the designated projects listed in the *Regulations,* lie exclusively with the provinces. Provincial decisions about such works are made in accordance with provincial legislation, which "can affect and thus apply" to Indigenous peoples and their rights and interests.[42] Provinces are legally and constitutionally capable of considering and addressing impacts to Indigenous rights and interests, both in the course of statutory decision-making[43] and in discharging their duty to consult and accommodate Indigenous peoples with respect to the potential effects of a provincial decision on section 35 rights.[44]

32. Alberta agrees with Mikisew Cree that the duty to consult in respect of section 35 rights should not be conflated with *vires.* Section 35 is not a separate source of legislative jurisdiction and, in any event, Aboriginal and treaty rights protected by section 35 have no bearing on division

[40] See Factum of the Attorney General of Manitoba at paras 69-71.
[41] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 37 [***Grassy Narrows***].
[42] *ABCA Reasons* at paras 154-157.
[43] *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102 [***Mikisew***].
[44] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *Grassy Narrows*.

of powers issues.[45] Importantly, the duty to consult is triggered by government decision-making that may have adverse effects on section 35 rights. Such government decision-making must in turn be supported by underlying jurisdiction under sections 91 to 95 of the *Constitution Act, 1867*.[46]

33. The courts have firmly rejected the notion that section 91(24) provides Canada with a residual role in provincial decisions in relation to provincial matters that may affect Indigenous interests or rights. In *Keewatin v Ontario (Minister of Natural Resources),* which this Court affirmed in *Grassy Narrows,* the Ontario Court of Appeal stated:

> With respect, such an expansion of s. 91(24) jurisdiction would render illusory provincial jurisdiction over the disposition and management of public lands and forests under ss. 109, 92(5) and 92A. .... It would also be contrary to the Supreme Court's emphasis on balanced federalism and the interdiction that a "federal head of power cannot be given a scope that would eviscerate a provincial legislative competence": see *Reference Re: Securities Act,* 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 71.[47]

34. In *Chartrand v The District Manager,* the British Columbia Supreme Court dismissed a request from a First Nation to issue a declaration directing the provincial Crown to engage the federal Crown in relation to certain provincial forestry and land decisions, holding that "the Federal Crown has no jurisdiction to enforce, review or rescind the Decisions and it cannot be compelled to take steps to do so. The involvement of the Federal Crown in the Decisions is constitutionally unwarranted".[48]

35. More recently, in *George Gordon First Nation v Saskatchewan,* the Saskatchewan Court of Appeal cited *Chartrand* and *Grassy Narrows* with approval, stating:

> It is well-established that Canada has no right, let alone an obligation, to supervise Saskatchewan with regard to matters that fall within Saskatchewan's exclusive constitutional jurisdiction….While the Crown is indivisible, that concept does not permit Canada to interfere in areas that are under Saskatchewan's exclusive jurisdiction. Canada does not have supervisory jurisdiction over mineral dispositions made by Saskatchewan.

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[45] *Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 at paras 28-31 [***Northern Inter-Tribal***].
[46] *ABCA Reasons* at para 154.
[47] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 at para 205 [***Keewatin***].
[48] *Chartrand v The District Manager*, 2013 BCSC 1068 at para 206, aff'd in part, 2015 BCCA 345.

> Supervision over Saskatchewan's conduct resides with the courts, not with Canada.[49] [Citations omitted]

36. This Court's decision in *NIL/TU,O* confirms that Canada's powers under section 91(24) do not extend to enabling Canada to regulate any matter that may affect Indigenous peoples, regardless of underlying jurisdiction over the matter.[50] An electricity generation facility, over which provinces have exclusive legislative jurisdiction, "does not become federally regulated just because it" may have impacts on Indigenous rights and interests.[51] Indeed, if section 91(24) provides a valid constitutional basis for federal regulatory decision-making in relation to a physical activity on the basis that it may impact Indigenous peoples, then very few physical activities would be beyond the constitutional reach of the federal government.[52]

37. Any concern that effects of designated projects on Indigenous interests go unassessed under provincial regimes or that provincial regimes leave a gap that the *IAA* must fill are not supported by evidence or the jurisprudence. Alberta, like other provinces, has in place a comprehensive regime to consider and assess effects of projects on Indigenous peoples, including their rights and interests.[53] Indeed, unlike Canada, Alberta has an Aboriginal Consultation Office whose primary function is working closely with other government ministries and regulators to ensure that Alberta's duty to consult is met.[54]

38. The concerns identified in paragraph 28 of Mikisew Cree's factum are addressed in provincial environmental assessments. For example, in Decision 2019 ABAER 006: *Syncrude Canada Ltd. Mildred Lake Extension Project and Mildred Lake Tailings Management Plan*, the Alberta Energy Regulator ("**AER**") considered impacts of an oil sands mine expansion project on, among other things, hydrology/surface water quantity (including impacts on water bodies used by Indigenous groups as well as the Peace Athabasca Delta), human health (including Indigenous

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[49] *George Gordon First Nation v Saskatchewan*, 2022 SKCA 41 at para 162.
[50] *NIL/TU,O Child & Family Services Society v BCGEU*, 2010 SCC 45; *Northern Inter-Tribal* at para 24.
[51] *Northern Inter-Tribal* at para 24.
[52] *ABCA Reasons* at para 304.
[53] Affidavit of Corinne Kristensen, dated December 12, 2019 at paras 13, 32-35, 81-86 [**Kristensen Affidavit**] [**Canada Appeal Record Vol 2-4, Tab 9**].
[54] Kristensen Affidavit at paras 81-86.

health), fisheries and fish habitat, socioeconomic effects (including spending with Indigenous companies, Indigenous employment, and mitigation measures to address the influx of workers into the region, including Indigenous awareness training), and treaty rights, traditional land use and Indigenous culture (including matters related to hunting, fishing, plant harvesting, navigability, important cultural places, reclamation, and cumulative impacts).[55]

39. In *Mikisew,* the Federal Court rejected Mikisew Cree's argument that concerns about impacts from an oil sands mine expansion on its Aboriginal and treaty rights, including impacts to Wood Buffalo National Park and species at risk, would go unaddressed in the provincial environmental assessment regime. The Court found that Mikisew Cree would have an opportunity to bring forward its views and concerns in the provincial process and that it is the AER that "examines the Extension Project and any environmental or Aboriginal and Treaty right concerns".[56]

40. Thus, there is no provincial inability or gap to be filled by the *IAA* in the assessment of effects of physical activities on Indigenous peoples and their rights and interests. While certain of the *IAA* Interveners may have a policy preference for federal assessments, other Interveners such as the Indian Resource Council and Woodland Cree First Nation view the *IAA* as paternalistic and an impediment to the full realization of their rights.

41. Neither the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") nor the concept of reconciliation affect the division of powers analysis, particularly as these are not distinctly federal matters. UNDRIP is a legally non-binding international declaration that is aspirational in nature. It cannot be read as somehow enlarging federal jurisdiction in Canada.[57]

42. Finally, reconciliation with Indigenous peoples is not solely a federal responsibility. To the contrary, as the Ontario Court of Appeal stated in *Keewatin*, imposing such a federal role may undermine reconciliation:

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[55] Affidavit of Camille Almeida, dated December 12, 2019 at Exhibits E-F [**Canada Appeal Record Vol 4-5, Tab 10**].
[56] *Mikisew* at para 98.
[57] *Wesley v Alberta*, 2022 ABKB 713 at para 145.

> Leaving meaningful constitutional space for the exercise of provincial jurisdiction under ss. 109, 92, para. 5 and 92A, without federal control under s. 91, para. 24, fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation.[58]

The very important pursuit of reconciliation does not affect the division of powers analysis or enlarge Canada's areas of jurisdiction.

(b) The National Concern Branch of POGG Cannot Sustain the *IAA*

43. A number of the *IAA* Interveners argue, though Canada does not, that the *IAA* should be supported using the national concern doctrine of the Peace, Order and Good Government ("**POGG**") clause of the Constitution.

44. This Court discussed, and indeed restated, the national concern doctrine of the POGG clause in the *GGPPA Reference*:

> [T]he national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces under s. 92. The national concern test is the mechanism by which matters of inherent national concern, which transcend the provinces, can be identified.[59]

45. However, the effect of finding that a matter is one of national concern is permanent.[60] As La Forest J stated in *Crown Zellerbach*, when the federal government asserts authority on the basis of national concern, the challenge for the courts will be to allow federal Parliament sufficient scope to deal with the national concern or international problem, *while respecting the scheme of federalism provided by the Constitution*.[61]

46. The POGG national concern analysis has three steps: first, the threshold question, which relates not to newness but to whether the matter is of sufficient concern to Canada as a whole;

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[58] *Keewatin* at para 154.
[59] *GGPPA Reference* at para 89.
[60] *Re Anti-Inflation Act*, [1976] 2 SCR 373, 1976 CanLII 16 at 460-61.
[61] *R v Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401, 49 DLR (4th) 161 at 448, per La Forest J (in dissent).

second, the singleness, distinctiveness and indivisibility analysis; and third, the scale of impact on provincial jurisdiction.[62]

47. Establishing that a matter is qualitatively different from matters of provincial concern is necessary to prevent federal overreach. This Court stated in the *GGPPA Reference*:

> [F]ederal 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.[63]

48. First, the matter of impact assessment does not meet the threshold question. Impact assessment, particularly of provincial undertakings, is a matter of provincial concern and does not engage federal consideration sufficient to engage POGG and the national concern doctrine.

49. Second, the matter does not have the requisite singleness, distinctiveness, and indivisibility. Impact assessment at the federal level, including the determination of whether intra-provincial projects are in the overall public interest, is not qualitatively different from matters of provincial concern. The *IAA* overshoots regulation of the truly federal or national aspects of impact assessment and resorts to regulating predominantly provincial matters. Further, there is no evidence before this Court to support such a finding that federal impact assessment is single, distinct and indivisible.

50. Third, the mammoth scale of intrusion in provincial jurisdiction is untenable. The *IAA* undermines provinces' ability to regulate works, activities and economic priorities under their jurisdiction. The impact of not allowing Parliament to regulate in the manner allowed by the *IAA* cannot outweigh such intrusion into provincial jurisdiction.

51. Finally, the question before this Court in this appeal cannot be equated to the question before it in the *GGPPA Reference*. The Canadian Association of Physicians for the Environment, for example, argues that this Court has already determined that extraprovincial effects of greenhouse gas emissions is a recognized matter of national concern, seemingly alluding to the

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[62] *GGPPA Reference* at para 141.
[63] *Ibid* at para 150.

decision of this Court in the *GGPPA Reference*.[64] However, the *GGPPA Reference* did not recognize extraprovincial effects of greenhouse gas emissions to be a matter of national concern and, indeed, Canada abandoned this position in its argument before this Court.

(c) The *IAA* is Not Valid Criminal Law

52. Ecojustice relies on the criminal law power, section 91(27) of the *Constitution Act, 1867*, to provide the federal jurisdiction necessary for the *IAA*. The Court of Appeal correctly rejected that the criminal law power could support the *IAA* and held that while section 7(1) prohibited the causing of certain enumerated effects, and section 144 contained penalties for breach of the prohibition, the *IAA* did not have a valid criminal purpose.[65]

53. A law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest.[66] Where legislation is excessively regulatory, its characterization under the criminal law power can be problematic.[67] Where a prohibition is "confined to ensuring compliance with the scheme" a law will be regulatory, not criminal, in nature.[68]

54. Alberta submits that the *IAA* is a purely regulatory law: it lacks uniform effect, focusing on the size of projects or their specific industries;[69] its reach is not limited to harmful effects but, instead, any effects to areas of federal jurisdiction;[70] the federal executive is authorized to let projects proceed, or to impose conditions, in compliance with a regulatory scheme, acting to regulate, rather than prohibit; and it is directed at a public interest typically protected by regulatory, not criminal, law.[71]

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[64] Factum of the Canadian Association of Physicians for the Environment at para 29.
[65] *ABCA Reasons* at para 402-408.
[66] *Genetic Non-Discrimination* at paras 74, 137.
[67] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada, 2013) at §8.13.
[68] *Reference re Firearms Act*, 2000 SCC 31 at para 38.
[69] *ABCA Reasons* at para 406.
[70] *Ibid* at para 405.
[71] *Ibid* at para 407.

55. The regulatory nature of the *IAA* is even clearer when its provisions are considered together. It does not criminalize conduct – whether it is conduct affecting wildlife or the environment – rather, it prohibits the carrying forward of a designated project pending an impact assessment or direction from the Agency in instances where that designated project might cause effects such as a "change", negative or positive, in the environment or in relation to other matters such as Indigenous issues. In this sense, the *IAA* cannot be upheld under section 91(27) because the prohibitions and penalties under the *Act* relate to administrative matters rather than the prohibition and punishment of environmental threat. The offences and penalties in the *IAA* are incidental to its true regulatory nature and, accordingly, the *IAA* is not valid criminal law.

(d) There is No Federal Power Over Greenhouse Gas Emissions

56. Ecojustice argues that there is ample constitutional basis for general assessment of greenhouse gas emissions, a position that comes close to advocating for a federal power over greenhouse gases, or the environment, generally.[72]

57. In the *GGPPA Reference*, this Court declined to find that the matter of the *GGPPA* was the regulation of greenhouse gases generally. This Court additionally found that the mischief that Parliament had intended to address with the *GGPPA* was not greenhouse emissions, but rather the effects of the failure of some provinces to implement greenhouse gas pricing systems, or to implement sufficiently stringent pricing systems, and the consequential effects.[73]

58. Canadian courts have rejected the view that the federal government has the power to regulate greenhouse gases generally.[74] The Saskatchewan Court of Appeal disagreed that greenhouse gas emissions could be properly allocated to the federal government via the national concern doctrine, stating:

> Where does this lead? All things considered, it is not possible to conclude "GHG emissions" or, as Canada puts it in oral argument, "the cumulative dimensions of GHG emissions" fall within federal jurisdiction by virtue of the national concern doctrine. Even assuming a matter framed in this way has the sort of singleness, distinctiveness and indivisibility demanded by the

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[72] Ecojustice Factum at paras 23-24.
[73] *GGPPA Reference* at paras 61, 68, 168.
[74] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 198.

> *Crown Zellerbach* test, the fundamental distribution of legislative power under the *Constitution Act, 1867* would be upset if it were allocated to Parliament.[75]

59. This proposed argument does not support the *IAA*, which in any event goes far beyond regulation of such concern, and is not properly characterized as legislation in respect of the regulation of greenhouse gas emissions.

C. Relief Sought

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

Respectfully submitted at the City of Calgary this 1st day of February, 2023.

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Per:

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[75] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 127, 138.

III. TABLE OF AUTHORITIES

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2.	*Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63	32, 36
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31.	*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44	31
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33.	*Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322, 156 DLR (4th)	11

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