



SUPREME COURT OF CANADA

CITATION: Reference re *Impact Assessment Act*, 2023 SCC 23

APPEAL HEARD: March 21, 22, 2023

JUDGMENT RENDERED:
October 13, 2023

DOCKET: 40195

BETWEEN:

Attorney General of Canada
Appellant

and

Attorney General of Alberta
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Newfoundland and Labrador, Indian Resource Council, File Hills Qu'Appelle Tribal Council, Pasqua First Nation, World Wildlife Fund Canada, Nature Canada, West Coast Environmental Law Association, Canadian Association of Petroleum Producers, Canadian Taxpayers Federation, Athabasca Chipewyan First Nation, Business Council of Alberta, Ecojustice Canada Society, Woodland Cree First Nation, Mikisew Cree First Nation, Hydro-Québec, Canadian Constitution Foundation, Independent Contractors and Businesses Association, Alberta Enterprise Group, Canadian Association of Physicians for the Environment, Advocates for the Rule of Law, Oceans North Conservation Society, Canadian Environmental Law Association, Environmental Defence Canada Inc., MiningWatch Canada Inc., Explorers

**and Producers Association of Canada, First Nations Major Projects Coalition
Society, Centre québécois du droit de l'environnement and Lummi Nation
Intervenors**

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:** Wagner C.J. (Côté, Rowe, Martin and Kasirer JJ. concurring)
(paras. 1 to 216)

**JOINT REASONS
DISSENTING IN
PART:** Karakatsanis and Jamal JJ.
(paras. 217 to 361)

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IN THE MATTER OF a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta concerning the constitutionality of the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, and of the *Physical Activities Regulations*, SOR/2019-285

Attorney General of Canada

Appellant

v.

Attorney General of Alberta

Respondent

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Newfoundland and Labrador,
Indian Resource Council,
File Hills Qu'Appelle Tribal Council,
Pasqua First Nation,
World Wildlife Fund Canada,
Nature Canada,
West Coast Environmental Law Association,
Canadian Association of Petroleum Producers,
Canadian Taxpayers Federation,
Athabasca Chipewyan First Nation,
Business Council of Alberta,
Ecojustice Canada Society,
Woodland Cree First Nation,
Mikisew Cree First Nation,
Hydro-Québec,
Canadian Constitution Foundation,
Independent Contractors and Businesses Association,
Alberta Enterprise Group,
Canadian Association of Physicians for the Environment,**

**Advocates for the Rule of Law,
Oceans North Conservation Society,
Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
MiningWatch Canada Inc.,
Explorers and Producers Association of Canada,
First Nations Major Projects Coalition Society,
Centre québécois du droit de l'environnement and
Lummi Nation**

Intervenors

Indexed as: Reference re *Impact Assessment Act*

2023 SCC 23

File No.: 40195.

2023: March 21, 22; 2023: October 13.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Constitutional law — Division of powers — Environmental impact assessment — Federal statute and regulations establishing assessment process for projects potentially having environmental impacts — Whether statute and regulations intra vires Parliament — Constitution Act, 1867, ss. 91, 92 — Impact Assessment Act, S.C. 2019, c. 28, s. 1 — Physical Activities Regulations, SOR/2019-285.

In 2019, following a review of the existing federal environmental assessment process, Parliament enacted the *Impact Assessment Act* (“IAA”) and the Governor in Council made the *Physical Activities Regulations* (“Regulations”) under the IAA. The IAA and the Regulations establish a complex information gathering and regulatory scheme, which is essentially two schemes in one. First, a discrete portion of the scheme — contained in ss. 81 to 91 of the IAA — deals with projects carried out or financed by federal authorities on federal lands or outside Canada. Second, the balance of the scheme — made up of the IAA’s remaining provisions and the Regulations — deals with “designated projects” as defined in the IAA.

The impact assessment process for designated projects can be divided into three main phases: the planning phase, the impact assessment phase and the decision-making phase. The planning phase focuses on initial information gathering. The proponent of a designated project must provide the Impact Assessment Agency with an initial project description. The Agency then consults with a number of parties, and decides whether the project requires an impact assessment. In the impact assessment phase, the proponent is required to provide the necessary information or studies to the entity conducting the assessment, which will be the Agency or its delegate. This phase culminates in the preparation of an assessment report, which sets out the effects that are likely to be caused by the carrying out of the designated project and indicates those that are adverse “effects within federal jurisdiction” and those that are adverse “direct or incidental effects”, terms defined in s. 2 of the IAA. The assessment report must also take into account numerous mandatory assessment factors

listed in s. 22 of the *IAA*. The mandatory factors include changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes. Finally, during the decision-making phase, the decision maker must determine whether the adverse effects within federal jurisdiction and the adverse direct or incidental effects are in the public interest. If the decision maker concludes that the effects in question are in the public interest, the Minister of the Environment must establish any condition that the Minister considers appropriate in relation to those effects.

The assessment process set forth in ss. 81 to 91 focuses on a narrow set of projects: physical activities carried out on federal lands or outside Canada in relation to a physical work that are not designated projects or physical activities designated by regulation, and physical activities designated under s. 87 or that are part of a designated class of physical activities. Sections 81 to 91 do not dictate an impact assessment process but rather require the federal authority that carries out or finances the project to decide if the project is likely to cause significant adverse environmental effects. If so, it must then be determined whether these effects are justified in the circumstances.

Alberta's Lieutenant Governor in Council referred two questions to the province's Court of Appeal. They asked whether the *IAA* was unconstitutional, in whole or in part, as being beyond the legislative authority of Parliament under the Constitution, and whether the Regulations were unconstitutional, in whole or in part, by virtue of purporting to apply to certain activities listed in Schedule 2 that relate to

matters entirely within the legislative authority of the provinces under the Constitution. A majority of the Court of Appeal concluded that the *IAA* and the Regulations are *ultra vires* Parliament and therefore unconstitutional in their entirety. The Attorney General of Canada appeals as of right to the Court.

Held (Karakatsanis and Jamal JJ. dissenting in part): The appeal should be allowed in part.

Per Wagner C.J. and Côté, Rowe, Martin and Kasirer JJ.: The reference questions should be answered in the affirmative: the federal impact assessment scheme is unconstitutional in part. Although the process set forth in ss. 81-91 of the *IAA* is constitutional and can be separated out, the balance of the scheme — that is, the “designated projects” portion — is *ultra vires* Parliament and thus unconstitutional. The designated projects scheme is *ultra vires* for two overarching reasons: it is not in pith and substance directed at regulating “effects within federal jurisdiction” as defined in the *IAA* because these effects do not drive the scheme’s decision-making functions, and the defined term “effects within federal jurisdiction” does not align with federal legislative jurisdiction. The overbreadth of these effects exacerbates the constitutional frailties of the scheme’s decision-making functions. Environmental protection remains one of today’s most pressing challenges, and Parliament has the power to enact a scheme of environmental assessment to meet this challenge, but Parliament also has the duty to act within the enduring division of powers framework laid out in the Constitution.

The division of powers analysis has two steps: characterization and classification. At the characterization step, a court must consider the purpose and effects of the challenged law in order to identify its pith and substance. In order to determine a law's purpose, a court looks to both intrinsic evidence (the text of the law, its preamble, its purpose clause, if it has one, its title and its overall structure) and extrinsic evidence (the context of the law in question, the minutes of parliamentary committees and relevant government publications). In analyzing the effects of the challenged law, a court considers both legal effects (effects that flow directly from the provisions of the statute itself) and practical effects (effects that flow from the application of the statute). Finally, the court must characterize the pith and substance of the challenged law as precisely as possible, capturing the law's essential character in terms that are as precise as the law will allow. Characterization is distinct from classification, and it is imperative that the characterization and classification analyses be kept distinct. In determining the pith and substance of a law, courts must not refer to the heads of power contained within the *Constitution Act, 1867*. The characterization step of the analysis must focus exclusively on the pith and substance or dominant characteristic of the law. Only after precisely stating the matter to which the law relates should a court proceed to the classification phase of the analysis and consider specific heads of power.

In addition, the presumption of constitutionality is a cardinal principle of the Court's division of powers jurisprudence. According to this presumption, every legislative provision is presumed to be *intra vires* the level of government that enacted

it, so a court should approach any question as to its validity on the assumption that it was validly enacted unless the party challenging it demonstrates otherwise. This presumption also functions as a principle of statutory interpretation: it directs a court to assume that a legislative body does not intend to exceed its powers under the Constitution. Therefore, when characterizing a challenged law, a court faced with competing, plausible characterizations should normally choose that one that would support the validity of the law. However, this presumption is not an impermeable shield that protects legislation from constitutional review by courts, nor can they employ the presumption of constitutionality to rewrite legislative text as they see fit in order to bring it into compliance with the Constitution. Courts cannot rely on the presumption of constitutionality to disregard a statute that speaks clearly and is *ultra vires* its enacting body, and the presumption does not displace the duty of courts to meaningfully review the constitutionality of legislation. Similarly, a court cannot circumvent its duty to meaningfully review the constitutionality of legislation by suggesting that, insofar as an administrative decision maker applies a law unconstitutionally, the application of that law may be judicially reviewed. The constitutional validity of a law and its administrative application are distinct concepts. Where a law is *ultra vires* and therefore unconstitutional, it cannot be saved by the prospect of administrative judicial review.

After a court characterizes the matter of a law, it must determine the classes of subjects into which the matter falls by reference to the heads of power set out in s. 91 or 92 of the *Constitution Act, 1867*. If the matter of law is properly classified as falling

under a head of power assigned to the adopting level of government, the legislation is *intra vires* and valid. A law is classified based on its main thrust or dominant characteristic, and its secondary effects are not the focus of the validity analysis. The fact that a valid law incidentally touches on a head of power belonging to the other level of government does not affect its validity.

Classifying environmental legislation presents a challenge because the “environment” is not a head of power under s. 91 or 92 of the *Constitution Act, 1867*. Environmental management cuts across many different areas of constitutional responsibility. Accordingly, neither level of government has exclusive jurisdiction over the whole of the “environment” or over all “environmental assessment”. Both levels of government can legislate in respect of certain aspects of environmental protection, including certain aspects of the environmental assessment of physical activities. Shared federal and provincial responsibility for environmental impact assessment is neither unusual nor unworkable; rather, it is a central feature of environmental decision making in Canada. This is consistent with the double aspect doctrine, which reflects the idea that the same fact situation can be regulated from different perspectives, one falling within s. 91 and the other falling within s. 92. Nonetheless, the double aspect doctrine must be applied with caution. First, not all fact situations have a double aspect, and each fact situation must be identified with precision. Environmental assessment of physical activities may or may not have a double aspect in relation to a specific project. Second, the fact that environmental assessment of physical activities may have a double aspect — with some elements falling within the legislative authority of each level of

government — does not mean that it is an area of concurrent jurisdiction. If a fact situation can be regulated from both a federal perspective and a provincial perspective, it follows that each level of government can only enact laws which, in pith and substance, fall under its respective jurisdiction. The notion that both levels of government may legislate in respect of certain aspects of environmental protection, each pursuant to its own legislative competence, is also consistent with the principle of cooperative federalism. However, while flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. Courts may not, under the guise of cooperative federalism, erode the constitutional balance inherent in the Canadian federal state.

In the instant case, a careful analysis of the purpose and effects of the *IAA* and Regulations reveals that the scheme they establish has two distinct components: one dealing with “designated projects” and another addressing projects carried out or financed by federal authorities on federal lands or outside Canada (ss. 81 to 91 of the *IAA*). The intrinsic and extrinsic evidence reveal that the scheme articulates a broad array of purposes, including protecting the environment and fostering sustainability; satisfying Canada’s environmental obligations; assessing and regulating the broad effects of certain physical activities, such as effects on health, social and economic conditions; facilitating the participation of Indigenous peoples and the public; and establishing an efficient and transparent process. The legal and practical effects, considered together, reveal that the scheme establishes a comprehensive information-gathering and regulatory process. The pith and substance of the

“designated projects” component is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts. The pith and substance of the component set out in ss. 81 to 91 is to direct the manner in which federal authorities that carry out or finance a project on federal lands or outside Canada assess the significant adverse environmental effects that the project may have.

There is no doubt that Parliament can enact impact assessment legislation that is directed at the federal aspects of projects. The breadth of these “federal aspects” will vary with the circumstances. Where Parliament is vested with jurisdiction to legislate in respect of a particular activity, it has broad discretion to regulate that activity and its effects, but Parliament’s jurisdiction is more restricted where the activity falls outside of its legislative competence. In those cases, it can validly legislate only from the perspective of the federal aspects of the activity. The designated projects scheme treats all “designated projects” in the same way, regardless of whether Parliament is vested with broad jurisdiction over the activity itself or narrower jurisdiction over the activity’s impacts on federal heads of power. And many of the physical activities to which the scheme applies are primarily regulated through the provincial legislatures’ powers over local works and undertakings or natural resources. Parliament can enact impact assessment legislation to regulate these projects from a federal perspective, so long as the regulation of federal aspects represents the dominant characteristic of the law.

The “designated projects” scheme is *ultra vires*, as its pith and substance exceeds the bounds of federal jurisdiction. This is so for two overarching reasons. First, the “effects within federal jurisdiction” do not drive the scheme’s decision-making functions. Consequently, the scheme is not in pith and substance directed at regulating these effects. There are four decision-making junctures embedded in the scheme: (i) the designation of physical activities as “designated projects”; (ii) the screening decision; (iii) the delineation of the scope of the impact assessment and the factors to be considered therein; and (iv) the public interest decision and resulting regulation and oversight. The scheme requires the decision maker to consider a host of factors but does not specify how those factors are to drive the ultimate conclusion. The scheme’s decision-making mechanism thereby loses its focus on regulating federal impacts. Instead, it grants the decision maker a practically untrammelled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety. In this respect, the screening decision and the public interest decision are constitutionally problematic. The screening decision as to whether an impact assessment is required for a particular project must be rooted in the possibility of adverse federal effects. However, because the decision maker must take into account an open-ended list of factors, all of seemingly equal importance, only two of them tied to federal jurisdiction, an impact assessment could be required for reasons other than, or not sufficiently tied to, the project’s possible impacts on areas of federal jurisdiction. Similarly, the public interest decision must focus on the project’s federal effects. However, because the mandatory public interest factors are not all confined to federal legislative competence, and because some factors are framed in relation to the

assessment of the project as a whole rather than to the adverse “effects within federal jurisdiction”, a determination of whether adverse federal effects are in the public interest is transformed into a determination of whether the project as a whole is in the public interest.

Second, the defined term “effects within federal jurisdiction” does not align with federal legislative jurisdiction under s. 91, but rather, goes far beyond its limits. Its overbreadth manifests itself in two distinct ways. First, the definition of “effects within federal jurisdiction” is central to the scheme’s decision-making functions. Its overbreadth dilutes the focus at the key decision-making junctures, shifting it away from federal aspects and encompassing aspects that are within provincial jurisdiction. Second, the defined “effects within federal jurisdiction” result in impermissibly broad prohibitions. Due to the overbreadth of these defined effects, the conduct prohibited by s. 7 of the *IAA* extends beyond the range of conduct that Parliament can validly regulate pursuant to its assigned heads of power.

The component of the scheme set out in ss. 81 to 91 of the *IAA* is clearly *intra vires* Parliament. These provisions have not been challenged as unconstitutional. Furthermore, the process established by these provisions resembles the process upheld by the Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. Though the test for severance in division of powers cases is stringent, ss. 81 to 91 can be separated from the balance of the scheme and upheld as constitutional.

Per Karakatsanis and Jamal JJ. (dissenting in part): The *IAA* and the Regulations are *intra vires* in their entirety. The environment, by its very nature, is complex and diffuse. It is not a subject matter assigned to either Parliament or the provinces under the *Constitution Act, 1867*, but instead cuts across many areas of constitutional responsibility, some federal, some provincial, and all levels of government bear an all-important duty to use their powers to protect it. This shared responsibility is neither unusual nor unworkable in a federal state such as Canada. Rather, it reflects the Court's flexible approach to federalism, which recognizes that overlapping powers are unavoidable and intergovernmental cooperation is essential. Legislation must be approached from a posture of respect and presumed good faith on the part of legislatures, interpreted to comply with constitutional limits, and evaluated on the basis that the courts should favour the operation of statutes enacted by both levels of government whenever possible. Courts must presume that the regime will be administered in a constitutionally compliant manner and will not find legislation unconstitutional simply because it could conceivably be misused. Courts must also recognize and respect the constitutional bargain struck with respect to the exclusive catalogue of both federal and provincial powers.

The *IAA* builds on earlier federal environmental assessment regimes by establishing a multi-stage process to assess the effects of designated projects and protect against adverse effects in specified areas, unless allowing them would be in the public interest. The *IAA* contains two distinct schemes: a primary scheme addressing physical activities designated as "designated projects", which takes up most of the *IAA*,

and a secondary scheme in ss. 81 to 91 that applies to federal projects. There is no dispute that the secondary scheme in ss. 81 to 91 for projects funded by the federal government or carried out either on federal lands or outside Canada is *intra vires* Parliament.

The *IAA*'s purpose and its practical and legal effects indicate that the pith and substance of the designated projects scheme is to establish an environmental assessment process to (1) assess the effects of physical activities or major projects on federal lands, Indigenous peoples, fisheries, migratory birds, and lands, air, or waters outside Canada or in provinces other than where a project is located, and (2) determine whether to impose restrictions on the project to safeguard against significant adverse federal effects, unless allowing those effects is in the public interest. This description of the pith and substance is more precise and highlights the critical role of the public interest decision-making process under the legislation. Based on that characterization, the public interest decision-making process under the *IAA* is constitutional, provided that it is anchored in adverse federal effects within Parliament's legislative jurisdiction over fisheries, navigable waters, Indians and lands reserved for Indians, criminal law, international and interprovincial rivers, and the national concern branch of the peace, order, and good government power.

The intrinsic and extrinsic evidence shows that the purpose of the *IAA* is to establish a transparent information-gathering and decision-making process about whether physical activities or designated projects have adverse federal effects, and if

so, whether they should be permitted in the public interest, with or without conditions. The intrinsic evidence suggests that the information-gathering process and decision-making function are more specifically directed at whether the project under consideration has any adverse effects within federal jurisdiction and, if so, whether those effects are nonetheless in the public interest. This more precise purpose of the *IAA* is reflected in the long title of the statute, the text and structure of the legislation, and the *IAA*'s stated purposes and preamble. Most importantly, the *IAA* is intended to protect the components of the environment and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project. Extrinsic evidence confirms that the *IAA*'s dominant purpose is to allow well-informed, transparent decisions as to whether allowing a project's adverse federal effects is in the public interest.

The *IAA*'s legal effects support that conclusion. The main legal effects of the *IAA* are that: (1) projects are designated based on the likelihood they would cause non-trivial adverse federal effects; (2) the Agency decides whether to assess projects on the same basis; (3) the Agency's report must identify the adverse federal effects that a project is likely to cause and specify the extent to which those effects are significant; and (4) the ultimate public interest determination and any resulting conditions imposed on the project must be reasonable and proportionate, based on the adverse federal effects, the extent to which they are significant, and whether they can be mitigated. The statutory text, context and purpose, along with the applicable interpretive principles, show that Parliament did not intend to capture *de minimis* effects. Indeed, the

significance threshold for adverse environmental effects permeates every major stage and decision taken under the *IAA* with respect to designated projects. Moreover, even if interpreting the *IAA* to capture *de minimis* effects were a reasonably available interpretation, the presumption of constitutionality demands that it be rejected in favour of a constitutionally-conforming interpretation. The *IAA*'s practical effects, including potential delays or the expenditure of resources, may be important policy matters for Parliament, but they are irrelevant for constitutional purposes.

Parliament chose broad language for what constitutes an “effect within federal jurisdiction” under the *IAA*, but each of the adverse federal effects is properly classified as falling under Parliament’s exclusive legislative jurisdiction. Each of the adverse federal effects anchor federal review and decision making under the *IAA* legislative scheme and fit within multiple heads of Parliament’s legislative jurisdiction under the *Constitution Act, 1867*. There are four decision-making junctures under the *IAA*: (a) designating physical activities as “designated projects”; (b) the screening decision as to whether a project should proceed to an impact assessment; (c) identifying the scope of the assessment and the factors to be considered; and (d) the public interest decision and resulting regulation and oversight. The adverse federal effects are not overbroad or misaligned with federal legislative jurisdiction.

At the first juncture, the designation process is driven by the potential for a physical activity to cause adverse federal effects. The designation process appropriately reflects the precautionary principle and the need to gather information at

an early stage of an environmental impact assessment process, to properly inform federal decision making about whether a designated project may cause adverse federal effects.

Once a project is designated under the Regulations or by ministerial order, the project moves to the second juncture, at which the Agency decides whether to conduct an impact assessment of the designated project based on mandatory factors in s. 16(2) of the *IAA*. This screening decision is anchored in the possibility that the designated project will cause adverse federal effects. Each of the discretionary factors in ss. 16(2)(a), (b), and (c) is rooted in adverse federal effects, and s. 16(2)(d) may also reflect adverse federal effects, depending on the comments of the public or the Indigenous group consulted. Section 16(2)(e) is largely irrelevant for most provincially regulated projects, unless they occur on federal lands or relate to a federal government policy, program, or plan, in which case there is a clear nexus to federal jurisdiction. Section 16(2)(f) applies only where another jurisdiction conducts an assessment, in which case it is appropriate for the Agency to consider what the other jurisdiction has to say. Finally, s. 16(2)(g) is a residuary clause that allows the Agency to consider other factors it considers appropriate, but, like any discretionary power granted under legislation, it must be exercised reasonably and consistent with the object and purpose of the *IAA*, which is to prevent significant adverse environmental effects. Fidelity to the principles of cooperative federalism confirms the constitutionality of the discretion granted under s. 16. A court, in evaluating the constitutionality of the legislation as a whole, must favour, where possible, the ordinary operation of statutes enacted by both

levels of government and must avoid blocking the application of measures enacted to promote the public interest, while the presumption of constitutionality requires a court to interpret the discretion granted under the legislation as being exercised in good faith and within constitutional bounds. Finally, if the Agency were to exercise its discretion to require a project with little or no potential for adverse federal impacts to proceed to an impact assessment, such a decision would be unreasonable and would not reflect the object and purpose of the *IAA* to prevent significant adverse federal environmental effects. Such a decision in a particular case, and based on an appropriate evidentiary record, would be subject to judicial review.

At the third juncture — the impact assessment phase — the Agency must take account of the broad range of factors in s. 22(1) of the *IAA*. When establishing the process for considering the environmental costs and benefits of a designated project that potentially has an adverse federal effect, Parliament is constitutionally entitled to instruct the decision maker to consider the full range of costs and benefits of the project. Some of the listed factors are effects that fall within federal jurisdiction, while others are intended to allow federal authorities to make a fully informed decision about the costs and benefits of proceeding with the project, with or without conditions, and about potential mitigation measures. This is essential for federal authorities to make an integrated decision as to the designated project's overall costs and benefits.

At the final juncture, the decision-making phase requires a cost-benefit analysis based on public interest factors identified in s. 63 of the *IAA*, including the

extent to which the designated project contributes to sustainability, has adverse federal effects that are significant as indicated in the impact assessment report, has an impact on any Indigenous group or adverse effects on the rights of Indigenous peoples protected under s. 35 of the *Constitution Act, 1982*, and hinders or contributes to the Government of Canada's ability to meet its environmental obligations and climate change commitments. Section 63 requires a reasonable and proportionate weighing of the public interest factors in deciding whether a project may proceed, and if so, whether any conditions should be imposed. This involves a cost-benefit balancing of the adverse federal effects and all other relevant public interest considerations relating to the project. As long as the public interest decision is anchored in federal jurisdiction based on adverse federal effects, federal authorities are entitled to make an integrated and proportionate decision that weighs the costs and benefits of allowing the project to proceed, and, if it is allowed to proceed, whether conditions should be imposed. When there is a clear impact on an area of federal jurisdiction, the decision whether to allow the project to go ahead in spite of the impact can be an integrated decision that takes into account issues that are within provincial jurisdiction. It does not serve to protect provincial jurisdiction to force the federal decision to be made in a partially blind manner. Nor can the decision be limited to whether adverse federal effects are in the public interest, without considering other factors. Adverse federal effects will rarely, if ever, be in the public interest. For a project to be in the public interest, its adverse federal effects need to be outweighed by other positive benefits of the project, so the federal decision maker must consider the socio-economic benefits that will flow from a project and that will outweigh the negative impacts. It cannot be constitutional for

federal authorities to consider whether a project has economic benefits, but unconstitutional for them to consider whether the same project promotes sustainable development.

The defined “effects within federal jurisdiction” serve as “triggers” or gateways for the prohibitions under s. 7 of the *IAA* and for the application of the designated projects scheme of the *IAA*. Parliament chose broad language for what constitutes an “effect within federal jurisdiction” under the *IAA*, but each effect, as defined, is properly classified as falling under Parliament’s exclusive legislative jurisdiction. None of the adverse federal effects is constitutionally overbroad. If Canada ever attempts to treat a project’s greenhouse gas emissions as an effect within federal jurisdiction, then whether an individual project’s greenhouse gas emissions, in context of the global scale of the climate crisis, may cause non-trivial changes to the environment is best assessed through case-specific judicial review.

Finally, the doctrine of interjurisdictional immunity does not apply. Characterizing a project as “provincial” is not a basis to reject the application of federal environmental assessment legislation — provincial works or undertakings are not shielded from otherwise valid federal legislation.

Cases Cited

By Wagner C.J.

Applied: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; **considered:** *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; **referred to:** *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 15 C.E.L.R. (4th) 53; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *Severn v. The Queen* (1878), 2 S.C.R. 70; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *McKay v. The Queen*, [1965] S.C.R. 798; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *Rizzo*

& Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, 434 D.L.R. (4th) 213, aff'd 2020 SCC 1, [2020] 1 S.C.R. 3; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Attorney General of Quebec v. IMTT-Québec inc.*, 2019 QCCA 1598, 79 Admin. L.R. (6th) 1; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273; *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *R. v. Khill*, 2021 SCC 37; *Fowler v. The Queen*, [1980] 2 S.C.R. 213; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Palmer v.*

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By Karakatsanis and Jamal JJ. (dissenting in part)

Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3; *Canadian Broadcasting Corp. v. Quebec Police Commission*, [1979] 2 S.C.R. 618; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028; *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R.

477; *Fowler v. The Queen*, [1980] 2 S.C.R. 213; *Reference re Environmental Management Act*, 2020 SCC 1, [2020] 1 S.C.R. 3; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536.

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APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J.A. and Watson, McDonald, Greckol and Streckf JJ.A.), *2022 ABCA 165*, 470 D.L.R. (4th) 1, 53 Alta. L.R. (7th) 1, 50 C.E.L.R. (4th) 1, 84 C.P.C. (8th) 1, [2023] 4 W.W.R. 1, [2022] A.J. No. 620 (QL), 2022 CarswellAlta 1175 (WL), in the matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta concerning the constitutionality of the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, and of the *Physical Activities Regulations*, SOR/2019-285. Appeal allowed in part.

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John W. Gailus and *Courtenay Jacklin*, for the intervener the Lummi Nation.

The judgment of Wagner C.J. and Côté, Rowe, Martin and Kasirer JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] Environmental protection is a fundamental value in Canadian society and one that is shared by Canadians from coast to coast. The Canadian judiciary, in tandem with the other branches of government, has an important role to play in protecting the “right to a safe environment” (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55 (emphasis deleted), quoting the Law Reform Commission of Canada, *Crimes Against the Environment* (1985), Working Paper 44, at p. 8). At the same time, as the guardian of the Constitution, the judiciary has a vital role to play in ensuring that legislative efforts aimed at environmental protection comport with Canada’s constitutional framework.

[2] Three decades ago, this Court acknowledged that the “protection of the environment has become one of the major challenges of our time” (*Friends of the*

Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at p. 16). In a long line of cases since then, this Court has affirmed that both Parliament and the provincial legislatures have the ability to enact laws to address various facets of environmental protection, including schemes of environmental assessment (see, e.g., *Oldman River; R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (“*References re GGPPA*”). But this Court has also affirmed that each level of government must confine its legislative efforts to its own constitutional sphere.

[3] This appeal is not about whether Parliament can enact legislation to protect the environment. It is clear that Parliament can do so under the heads of power assigned to it in the *Constitution Act, 1867*. Rather, this appeal calls upon this Court to evaluate the constitutional validity of the specific legislative scheme Parliament has enacted to protect the environment from certain human activities: the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (“*IAA*”), and the related *Physical Activities Regulations*, SOR/2019-285 (“*Regulations*”). This Court must ensure that, in its laudable pursuit of environmental protection and sustainability, Parliament has not overstepped its constitutional limits.

[4] I emphasize at the outset that, while environmental protection is a fundamental Canadian value, it must always comport with the constitutional division

of powers. Because environmental protection cuts across many different areas of constitutional responsibility, it necessarily touches on both federal and provincial legislative powers. Given the “sweeping” nature of environmental regulation, division of powers disputes in the environmental context must be approached with “[g]reat sensitivity” (see *Hydro-Québec*, at para. 154). Respect for the division of powers drives the enactment of robust environmental protection legislation and facilitates cooperation between the two levels of government.

[5] Having carefully considered the complex legislative scheme at issue in this appeal, I conclude that it is unconstitutional in part. As I will explain, the scheme is essentially two schemes in one. First, a discrete portion of the scheme — contained in ss. 81 to 91 of the *IAA* — deals with projects carried out or financed by federal authorities on federal lands or outside Canada. In pith and substance, this portion of the scheme directs the manner in which federal authorities assess the significant adverse environmental effects that such projects may have. This portion of the scheme is clearly *intra vires*.

[6] Second, the balance of the scheme — made up of the *IAA*’s remaining provisions and the Regulations — deals with “designated projects” as defined in the *IAA*. The pith and substance of this designated projects scheme is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts. In my view, Parliament has plainly overstepped its constitutional competence in enacting this designated projects

scheme. This scheme is *ultra vires* for two overarching reasons. First, it is not in pith and substance directed at regulating “effects within federal jurisdiction” as defined in the *IAA* because these effects do not drive the scheme’s decision-making functions. Second, I do not accept Canada’s contention that the defined term “effects within federal jurisdiction” aligns with federal legislative jurisdiction. The overbreadth of these effects exacerbates the constitutional frailties of the scheme’s decision-making functions.

[7] Environmental protection remains one of today’s most pressing challenges. To meet this challenge, Parliament has the power to enact a scheme of environmental assessment. Parliament also has the duty, however, to act within the enduring division of powers framework laid out in the Constitution.

[8] These reasons will proceed as follows. I will begin by reviewing the evolution of federal environmental assessment as well as the structure and operation of the impugned scheme. With this background in mind, I will summarize the reasons of the Court of Appeal of Alberta and frame the issue on appeal. I will then analyze the constitutional validity of the scheme and, finally, address two additional discrete issues raised in this appeal.

II. The Evolution of Federal Environmental Assessment

A. *The Nature and Purpose of Environmental Assessment*

[9] For decades, both the federal and provincial governments have engaged in environmental assessment. Canada's first environmental assessments were carried out in the 1970s, and by the 1990s, most Canadian jurisdictions had enacted mandatory environmental assessment legislation (M. Doelle and C. Tollefson, *Environmental Law: Cases and Materials* (3rd ed. 2019), at p. 593). Before I canvass the evolution of Canadian legislation in this area, it will be useful to consider the nature and purpose of environmental assessment.

[10] In *Oldman River*, this Court described environmental assessment as “a planning tool that is . . . an integral component of sound decision-making” (p. 71). The basic idea of environmental assessment is that “certain proposed activities should be scrutinized in advance from the perspective of their possible environmental consequences” (J. Benidickson, *Environmental Law* (5th ed. 2019), at p. 257). Accordingly, environmental assessment processes are prospective in nature; they “seek to anticipate, prevent or reduce environmental impacts of proposed new activities rather than try to manage the impacts of existing activities” (Doelle and Tollefson, at p. 593; see also O. P. Dwivedi et al., *Sustainable Development and Canada: National & International Perspectives* (2001), at p. 157).

[11] As many of the interveners in this appeal highlighted, the environment is of concern not only to the federal government but also to the provincial governments and to communities from coast to coast. There exists a great diversity of provincial environmental assessment legislation across the country. At the federal level,

environmental assessment legislation has evolved substantially over the last four decades. I turn now to this evolution.

B. *A History of Federal Environmental Assessment*

[12] As a prelude to evaluating the constitutional validity of the scheme, it will be helpful to situate it within the broader history of federal environmental assessment frameworks. In the sections that follow, I canvass the evolution of federal environmental assessment since the 1980s. Two key trends emerge from this discussion.

[13] First, over time, the federal environmental assessment process has undergone a dramatic shift from employing a decision-based trigger to employing an effects- or project-based trigger. The first iterations of the process required an environmental assessment when the federal government had a decision-making responsibility in respect of a particular activity. This responsibility arose under separate federal legislation, such as provisions of the *Fisheries Act*, R.S.C. 1985, c. F-14, or *Navigable Waters Act*, R.S.C. 1985, c. N-22, related to the granting of permits. In contrast, more recent iterations of the environmental assessment process have applied on the basis of the types of projects involved or the types of effects these projects may cause.

[14] The second key trend is evident from the title of the impugned statute: *Impact Assessment Act*. Whereas previous federal enactments focused on

environmental effects specifically, the current scheme focuses on “impacts” of various kinds — including but not limited to environmental impacts. Although the “environment” was already understood broadly under previous schemes, this recalibrated focus makes it clear that social, health and economic impacts are also included in the assessment process.

[15] The federal environmental assessment process traces its roots back to 1973, when the federal Cabinet approved a recommendation for an Environmental Assessment and Review Process that was to apply to “all federal development proposals” (Dwivedi et al., at p. 157). Then, in 1984, the federal government issued the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 (“Guidelines Order”), through an order in council, to set out and clarify roles, responsibilities and procedures under the Environmental Assessment and Review Process (Dwivedi et al., at p. 158). I will begin my review of the federal assessment schemes with this Guidelines Order.

(1) The 1984 Guidelines Order

[16] The goal of the Guidelines Order was to ensure that the environmental effects of all proposals for which the federal government had a decision-making responsibility were considered fully and as early in the planning process as possible (J. B. Hanebury, “Environmental Impact Assessment in the Canadian Federal System” (1991), 36 *McGill L.J.* 962, at p. 969). The Guidelines Order applied to any proposed

“initiative, undertaking or activity for which the Government of Canada has a decision making responsibility” (s. 2 “proposal”).

[17] Under the Guidelines Order’s approach, a federal department would conduct an initial assessment of a proposal for which it was the decision-making authority. If the department determined that the project was likely to have significant environmental effects, then it would refer the project to the Minister of the Environment, who in turn would request an independent assessment from the Federal Environmental Assessment and Review Office. That office would establish a panel, which would ultimately submit an advisory report (Dwivedi et al., at p. 158; see also Federal Environmental Assessment Review Office, *The Federal Environmental Assessment and Review Process* (1987), at pp. 2-4).

[18] While there was initially some debate as to the binding force and constitutional validity of the Guidelines Order, this Court held in *Oldman River* that it was mandatory in nature and *intra vires* Parliament. Justice La Forest, writing for the Court on the *vires* issue, interpreted the Guidelines Order as applying where the federal government has “an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity” (p. 47). He reasoned that “[i]t cannot have been intended that the *Guidelines Order* would be invoked every time there [was] some potential environmental effect on a matter of federal jurisdiction” (p. 47). Rather, the Guidelines Order “has merely added to the matters that federal decision makers should consider” (p. 71).

(2) Canadian Environmental Assessment Act (1992)

[19] The *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“*CEAA 1992*”), was enacted in 1992 and came into force in 1994 and 1995. Like the Guidelines Order, the operation of the *CEAA 1992* was triggered by exercises of federal decision-making responsibility, including where the federal government proposed a project, where it provided financial assistance to a project, where the project involved federal lands, or where the federal government issued a permit or authorization for a project (s. 5(1)).

[20] Although there were similarities between the Guidelines Order and the *CEAA 1992*, the latter nonetheless introduced major changes to the federal environmental assessment regime. A key innovation of the *CEAA 1992* was that the bounds and steps of the federal environmental assessment regime were now set out in legislation. Placing the federal scheme on statutory footing made the environmental assessment process “less susceptible to interference by government without the approval of Parliament” (Doelle and Tollefson, at p. 597; see also R. B. Gibson, “The Major Deficiencies Remain: A Review of the Provisions and Limitations of Bill C-19, an Act to Amend the *Canadian Environmental Assessment Act*” (2001), 11 *J.E.L.P.* 83, at p. 85).

[21] The scope of environmental assessment under the *CEAA 1992* was broad. The *CEAA 1992* defined “environmental effect” as including “any change that the project may cause in the environment” as well as any health and socioeconomic effects

of such a change (s. 2(1)). Assessments considered a variety of factors, including comments from the public, mitigation measures, the purpose of the project and alternative ways of carrying out the project (s. 16). These assessments could take one of four forms: screening, comprehensive study, panel review and mediation (s. 14; see also A. Koehl, “EA and Climate Change Mitigation” (2010), 21 *J.E.L.P.* 181, at p. 185). Projects that did not require a specific federal decision could be referred to a mediator or review panel if the Minister of the Environment was of the opinion that the project might cause significant adverse effects in another province, outside of Canada or on federal lands (ss. 46 to 48).

(3) *Canadian Environmental Assessment Act, 2012*

[22] The *CEAA 1992* was repealed and replaced in 2012 as part of omnibus budget legislation (*Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 (assented to on June 29, 2012)). In at least five respects, the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (“*CEAA 2012*”), represented the next generation of federal environmental assessment.

[23] First, the *CEAA 2012* introduced a new triggering process that dictated when that statute applied (M. Doelle, “*CEAA 2012: The End Of Federal EA As We Know It?*” (2012), 24 *J.E.L.P.* 1, at p. 3). The *CEAA 2012* was the first federal assessment scheme that involved a project-based approach. It applied to projects that were designated by regulations or ministerial order (ss. 2(1) “designated project”, 14(2) and 84(a); *Regulations Designating Physical Activities*, SOR/2012-147). This project-

based scheme created an “out unless included” model; only designated projects were subject to the *CEAA 2012*, and all other projects were excluded.

[24] Second, the *CEAA 2012* granted the Canadian Environmental Assessment Agency broad discretion to screen designated projects for an assessment (s. 10). As a result, not all designated projects were automatically subject to an assessment. Indeed, far fewer environmental assessments were conducted under the *CEAA 2012* than under the former scheme (Doelle and Tollefson, at pp. 621-22; R. B. Gibson, “In full retreat: the Canadian government’s new environmental assessment law undoes decades of progress” (2012), 30 *Impact Assess. and Proj. Apprais.* 179, at pp. 181-82).

[25] Third, the *CEAA 2012* significantly narrowed the scope of federal environmental assessments. The *CEAA 2012* limited the definition of “environmental effects” to a small number of environmental components listed in s. 5. Some commentators have written that this was perhaps the most fundamental change to the federal environmental assessment process (Doelle, at p. 11; Gibson (2012), at p. 182).

[26] Fourth, the *CEAA 2012* reinvented the decision-making phase of the environmental assessment process. Following the assessment, the decision maker (typically the Minister of the Environment, the National Energy Board or the Canadian Nuclear Safety Commission) would decide whether the project was likely to cause significant adverse environmental effects (s. 52(1)). If it was, then the matter would be referred to the Governor in Council to decide whether the effects were justified in the circumstances (s. 52(2) to (4)). Conditions could be imposed if the project was not

likely to cause significant adverse environmental effects or if the significant adverse environmental effects it was likely to cause were justified in the circumstances (s. 53). Section 52(1) and (4), which grant the authority to make the decisions, did not enumerate the factors that could or had to be considered in the exercise of that authority.

[27] Finally, the *CEAA 2012* contained a secondary regime for projects carried out on federal lands or outside Canada (ss. 66 to 72; M. Z. Olszynski, “Impact Assessment”, in W. A. Tilleman et al., eds., *Environmental Law and Policy* (4th ed. 2020), 453, at p. 473). The provisions in question did not set out a formal assessment process. Rather, the relevant federal authorities had to be satisfied that no significant adverse environmental effects were likely or, if they were likely, that they were justified in the circumstances. This process harkened back to the Guidelines Order and the *CEAA 1992*, which similarly required federal decision makers to consider adverse environmental effects in discharging their responsibilities in respect of certain activities.

[28] Many of the significant innovations introduced by the *CEAA 2012* have been retained in the impugned statute. I note, as did the court below, that the provinces did not challenge the constitutionality of the *CEAA 2012*, and the only challenge to its constitutionality was addressed briefly and in the alternative (2022 ABCA 165, 470 D.L.R. (4th) 1, at para. 93; R.F., at para. 45; but see *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 15 C.E.L.R. (4th) 53, at para. 6).

[29] The *IAA* was the result of a four-year review of the federal environmental assessment process. The federal government established the Expert Panel for the Review of Environmental Assessment Processes, which recommended a major overhaul of the *CEAA 2012 (Building Common Ground: A New Vision for Impact Assessment in Canada)* (2017), at pp. 2-7; Olszynski, at p. 468; see also Natural Resources Canada, *Environmental and Regulatory Reviews: Discussion Paper* (2017) (“2017 Discussion Paper”), at p. 7). Whether the *IAA* actually reflects the recommendations for reform has, however, been questioned (see, e.g., Olszynski, at p. 469).

[30] The *IAA* was enacted as Part 1 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*, S.C. 2019, c. 28, assented to June 21, 2019. The Governor in Council has made regulations under the *IAA*, including the Regulations at issue in this appeal.

[31] I turn now to the basic architecture and operation of the *IAA* and the Regulations.

III. The Legislative Scheme

[32] The *IAA* and the Regulations establish a complex information gathering and regulatory scheme. To understand the scheme, one must have a grasp of both its general framework and its operation. I agree with the Court of Appeal’s observation

that the *IAA* “is essentially two acts in one” (para. 190). The bulk of the *IAA* covers physical activities that are designated as “designated projects”. Sections 81 to 91 of the *IAA*, however, establish a secondary scheme covering activities on federal lands or outside Canada that are not designated as “designated projects”.

[33] I will begin with the “designated projects” scheme and provide an overview of its three-phase impact assessment process. I will then turn to ss. 81 to 91 and summarize the operation of this secondary scheme.

A. *The “Designated Projects” Regulatory Scheme*

[34] Like its predecessor, the *IAA* applies to “designated projects”, which are defined in s. 2 as “physical activities . . . carried out in Canada or on federal lands [that] are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1)”. This includes “any physical activity that is incidental to those physical activities” (s. 2).

[35] Pursuant to s. 109(b), the Governor in Council has made the Regulations, which are sometimes called the “Project List” because they set out a list of designated physical activities. This Project List includes activities that, in the government’s view, are major projects with the greatest potential for adverse effects on areas of federal jurisdiction related to the environment (Regulatory Impact Analysis Statement, SOR/2019-285, *Canada Gazette*, Part II, vol. 153, No. 17, August 21, 2019).

[36] In addition, pursuant to s. 9(1), the Minister may “designate a physical activity that is not prescribed by regulations . . . if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects” (two defined terms, to which I will return), or public concerns related to those effects warrant the designation. The *IAA* imposes some limitations on ministerial designation, including that it must occur before the carrying out of the physical activity has substantially begun (s. 9(7)(a)).

[37] The impact assessment process for designated projects can be divided into three main phases: the planning phase, the impact assessment phase and the decision-making phase. These phases are followed by ongoing regulation in the form of monitoring, binding conditions and follow-up programs. Below, I provide a broad overview of each phase.

(1) The Planning Phase

[38] The planning phase focuses on initial information gathering. The introduction of this phase represented a major change from previous practice (Expert Panel, at pp. 58-61; R. Northey, *A Guide to Canada’s Impact Assessment Act* (2023 ed.), at pp. 10-14).

[39] The proponent of a designated project must provide the Impact Assessment Agency of Canada (“Agency”) with an initial project description that includes the information prescribed by regulations (s. 10(1); *Information and Management of Time*

Limits Regulations, SOR/2019-283, Sch. 1). The Agency then consults with a number of parties — including Indigenous groups, other jurisdictions and the public — and provides the proponent with a summary of issues with respect to the project (*IAA*, ss. 11 to 13 and 14(1)). The proponent responds by way of a notice setting out how it intends to address the issues and providing a detailed project description (s. 15(1)).

[40] The planning phase culminates in the Agency’s decision as to whether the project requires an impact assessment (s. 16). This is referred to as the “screening decision”. In making this decision, the Agency must consider the factors set out in s. 16(2). I will review this decision-making function in greater detail in the course of my analysis. If the Agency decides that the project requires an assessment, it must provide the proponent with a notice of commencement setting out the required information or studies (s. 18(1)(a)).

[41] Moreover, if the Minister, before the notice of commencement is issued, forms the view that “it is clear that the designated project would cause unacceptable environmental effects within federal jurisdiction”, then the Minister must provide the proponent with a written notice to that effect (s. 17(1)). This notice does not stop the impact assessment process.

(2) The Impact Assessment Phase

[42] In the impact assessment phase, the proponent is required to provide the necessary information or studies to the entity conducting the assessment, which will be

the Agency or its delegate (ss. 25 to 29). Assessments may be referred to a review panel or may be substituted for another jurisdiction's assessment process if appropriate (ss. 31(1), 33(1) and 36(1)).

[43] The assessment phase culminates in the preparation of an assessment report, which “must set out the effects that . . . are likely to be caused by the carrying out of the designated project” and indicate “those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects” (s. 28(3)). These two subcategories of effects are central to the scheme's operation, and I will therefore set out the relevant definitions in full. The umbrella term, “effects”, is defined as follows (s. 2):

effects means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes.

[44] The subcategories of effects — “direct or incidental effects” and “effects within federal jurisdiction” — are defined as follows in s. 2:

direct or incidental effects means effects that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, or to a federal authority's provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part.

effects within federal jurisdiction means, with respect to a physical activity or a designated project,

(a) a change to the following components of the environment that are within the legislative authority of Parliament:

(i) *fish and fish habitat, . . .*

(ii) *aquatic species, . . .*

(iii) *migratory birds, . . . and*

(iv) any other component of the environment that is set out in Schedule 3;

(b) a change to the environment that would occur

(i) on federal lands,

(ii) in a province other than the one where the physical activity or the designated project is being carried out, or

(iii) outside Canada;

(c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on

(i) physical and cultural heritage,

(ii) the current use of lands and resources for traditional purposes, or

(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;

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

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

[45] The assessment report must also take into account the factors listed in s. 22 of the *IAA*. I will return to these mandatory assessment factors in the course of my analysis. For now, I note that this list expands upon the previous list of assessment

factors under s. 19 of the *CEAA 2012*. For example, the *IAA* requires a consideration of “alternative means of carrying out the designated project” and “any alternatives to the designated project”, whereas the *CEAA 2012* only required consideration of the former (*IAA*, s. 22(1)(e) and (f); *CEAA 2012*, s. 19(1)(g)). Indigenous knowledge concerning the designated project was previously a discretionary consideration, but it is now mandatory (*CEAA 2012*, s. 19(3); *IAA*, s. 22(1)(g)). Finally, the *IAA* introduces a few new factors, including “the extent to which the designated project contributes to sustainability” and “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change” (s. 22(1)(h) and (i)).

(3) The Decision-Making Phase

[46] Finally, the impact assessment process advances to the decision-making phase. The identity of the decision maker will depend on which entity conducted the impact assessment. Where the assessment was conducted by the Agency, the decision maker is the Minister (s. 60(1)(a)). Where it was conducted by a review panel, or where the Minister exercises the discretion to refer the decision to the Governor in Council, the decision maker is the Governor in Council (ss. 60(1)(b), 61(1) and 62). The decision maker must “determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest” (s. 60(1)(a) and (b)). If the decision maker concludes that the

effects in question are in the public interest, the Minister must establish any condition that the Minister considers appropriate in relation to those effects (s. 64(1) and (2)).

B. *Sections 81 to 91: Non-Designated Projects on Federal Lands or Outside Canada*

[47] As discussed, the *CEAA 2012*'s secondary scheme for projects on federal lands or outside Canada has been retained in the *IAA*, with some modifications (ss. 81 to 91; Olszynski, at p. 473; Northey, at pp. 27-28; J. Kneen, "Impact Assessment for Projects on Federal Lands and Outside Canada: The 'Federal Projects' Process", in M. Doelle and A. J. Sinclair, eds., *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act* (2021), 388, at pp. 391-92; see also *CEAA 2012*, ss. 66 to 72).

[48] The assessment process set forth in ss. 81 to 91 is materially different from that contained in the balance of the *IAA*. The most significant difference is that the ss. 81 to 91 regime focuses on a narrow set of projects. A "project" under this portion of the scheme is defined as follows in s. 81:

project means

(a) a physical activity that is carried out on federal lands or outside Canada in relation to a physical work and that is not a designated project or a physical activity designated by regulations made under paragraph 112(1)(a.2); and

(b) a physical activity that is designated under section 87 or that is part of a class of physical activities that is designated under that section.

[49] The second major difference is that ss. 81 to 91 do not dictate an “impact assessment” process but rather require the federal authority that carries out or finances the project to decide if the project is likely to cause significant adverse environmental effects (ss. 84 to 89). This retains the *CEAA 2012*’s focus on significant adverse effects. By contrast, the “designated projects” portion of the scheme has done away with this significance threshold, though the significance of adverse effects remains a consideration in the assessment and decision-making phases (ss. 59(2) and 60(1)). If the non-designated project on federal lands or outside Canada is found to be likely to cause significant adverse environmental effects, it must then be determined whether these effects are justified in the circumstances (s. 90).

IV. The Judgment of the Court of Appeal of Alberta, 2022 ABCA 165, 470 D.L.R. (4th) 1

[50] Alberta’s Lieutenant Governor in Council referred two questions to the province’s Court of Appeal:

1. Is Part 1 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, S.C. 2019, c. 28 unconstitutional, in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada?
2. Is the Physical Activities Regulations, SOR/2019-285, unconstitutional in whole or in part by virtue of purporting to apply to certain activities listed in Schedule 2 thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada? [para. 4]

[51] A majority of the Court of Appeal (Fraser C.J.A. and Watson and McDonald J.J.A.) concluded that the *IAA* and the Regulations are *ultra vires* the federal government and therefore unconstitutional in their entirety. Justice Strekaf concurred in the result but did not sign on to the portion of the majority's reasons dealing with *de facto* expropriation (para. 435). Justice Greckol, writing in dissent, concluded that both the *IAA* and the Regulations are a valid exercise of Parliament's authority to legislate in respect of the environment (para. 443).

[52] The majority considered s. 92A of the *Constitution Act, 1867*, which it referred to as the "Resource Amendment". It held that s. 92A assures "exclusive provincial jurisdiction over the exploration, development, management and conservation of the province's . . . natural resources" and that approval of natural resource projects is therefore "vested exclusively" in the province that owns the resources (paras. 72 and 81 (emphasis deleted)). The majority referred to projects that are wholly within a province and are primarily regulated by the province as "intra-provincial projects".

[53] The majority then turned to the two-step constitutional validity analysis. At the characterization step, the majority concluded that the pith and substance of the *IAA* and the Regulations is "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval" (para. 372). The majority held that this matter "intrudes fatally into provincial jurisdiction and the

provinces' proprietary rights as owners of their public lands and natural resources” (para. 372).

[54] Turning to classification, the majority concluded that the matter of the scheme does not fall under any of the federal heads of power relied upon by Canada: sea coast and inland fisheries (s. 91(12) of the *Constitution Act, 1867*), imperial treaties (s. 132), “Indians, and Lands reserved for the Indians” (s. 91(24)) and the national concern branch of the peace, order and good government (“POGG”) power (s. 91). Nor does the matter fall under the federal heads of power proposed by the interveners: trade and commerce (s. 91(2)) and the criminal law power (s. 91(27)). Instead, the majority held that the matter of the scheme, when applied to intra-provincial designated projects, falls squarely within multiple heads of provincial power, including the development and management of natural resources (s. 92A) and property and civil rights in the province (s. 92(13)).

[55] The majority thus found the *IAA* and the Regulations to be *ultra vires* Parliament and unconstitutional in their entirety. Canada argued before the Court of Appeal that the *IAA* and the Regulations are not severable and must therefore stand or fall as a whole. The majority agreed and noted that it would not be practical to sever offending provisions from the *IAA* or to sever the Regulations from the *IAA* (para. 426).

[56] Finally, the majority considered the doctrine of interjurisdictional immunity. It held, in the alternative, that if the scheme were valid, then the doctrine of

interjurisdictional immunity would apply to protect the “core” of relevant provincial heads of power (para. 430).

[57] The dissenting justice characterized the pith and substance of the *IAA* and the Regulations as the establishment of “a federal environmental assessment regime that facilitates planning and information gathering with respect to specific projects to inform decision-making, cooperatively with other jurisdictions, as to whether the project should be authorized to proceed on the basis that identified adverse environmental effects purported to be within federal jurisdiction are in the public interest” (para. 593).

[58] The dissenting justice concluded that this matter can be classified under a number of federal heads of power. She found that each of the “effects within federal jurisdiction” defined in the *IAA* falls within Parliament’s legislative authority (paras. 605-6 and 611). In addition, she rejected the majority’s characterization of the public interest determination as a federal “veto” power (para. 717). Instead, she concluded that the *IAA* is designed to facilitate interjurisdictional cooperation rather than creating a competitive veto (paras. 723 and 730). The Attorney General of Canada appeals as of right to the Court.

V. Issue on Appeal

[59] The sole issue in this appeal is whether the *IAA* and the Regulations are *ultra vires* Parliament. I will consider the validity of the *IAA* and the Regulations

together as they are tightly linked and function as a unified scheme (see *Mining Watch*, at para. 31). The Regulations complete the statutory scheme by specifying the scope of the IAA's application to certain "designated projects"; they are indispensable to the IAA's characterization and classification (see *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 481). I note that the Court of Appeal adopted the same approach in its analysis (paras. 165 (majority) and 554 (dissent)).

[60] The division of powers analysis has two steps: characterization and classification. I will begin by canvassing the principles governing the characterization inquiry.

VI. Step 1: Characterization

A. *The Governing Principles*

(1) The Pith and Substance Analysis

[61] At the characterization step, a court must consider the purpose and effects of the challenged law in order to identify its "pith and substance" (*Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 ("*Quebec (Attorney General) 2015*"), at paras. 28-29; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 86; *References re GGPPA*, at para. 51). The objective of the characterization inquiry is to identify the precise

“matter” to which the law in question relates (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 26).

[62] In order to determine a law’s purpose, a court looks to both intrinsic and extrinsic evidence (*Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 17; *Canadian Western Bank*, at para. 27; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 34; *References re GGPPA*, at para. 51). Intrinsic evidence refers to material contained within the four corners of the law in question, including the text of the law, its preamble, its purpose clause, if it has one, its title and its overall structure. Extrinsic evidence refers to evidence that speaks to the context of the law in question, such as Hansard debates, the minutes of parliamentary committees and relevant government publications.

[63] In analyzing the effects of the challenged law, a court considers both legal and practical effects. Legal effects are those effects that “flo[w] directly from the provisions of the statute itself”, while practical effects are those “‘side’ effects [that] flow from the application of the statute which are not direct effects of the provisions of the statute itself” (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 54; see also *Morgentaler*, at pp. 482-83; *References re GGPPA*, at para. 51).

[64] Finally, the court must characterize the pith and substance of the challenged law “as precisely as possible” (*References re GGPPA*, at para. 52). If the pith and substance is characterized in overly broad terms, then “there is a danger of its

being superficially connected with a power of the other level of government” (*Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 190). In other words, an imprecise formulation of the pith and substance of the law can infect the subsequent classification analysis. An artificially narrow characterization can similarly distort the analysis. The court should “capture the law’s essential character in terms that are as precise as the law will allow” (*References re GGPPA*, at para. 52; *Reference re Genetic Non-Discrimination Act*, at para. 32).

(2) Characterization Is Distinct From Classification

[65] When formulating the pith and substance of a law, litigants and courts may be inclined to glance ahead to the classification step and the catalogue of potential heads of power. It is imperative, however, that the characterization and classification analyses be kept distinct (*References re GGPPA*, at para. 56). In determining the pith and substance of a law, courts must not refer to the heads of power contained within the *Constitution Act, 1867*. Only after precisely stating the matter to which the law relates should a court proceed to the classification phase of the analysis and consider specific heads of power.

[66] The judges in the court below, the parties and the interveners adopt differing articulations of the impugned scheme’s pith and substance. With respect, several of these articulations erroneously combine or conflate the characterization of the scheme with its classification.

[67] The Attorney General of Canada submits that the pith and substance of the IAA is to “establish a federal environmental assessment process to safeguard against adverse environmental effects in relation to matters within federal jurisdiction” (A.F., at para. 47). The latter part of this characterization — “in relation to matters within federal jurisdiction” — predetermines the classification of the matter of the scheme under federal heads of power. It amounts to a statement that the main thrust of the scheme is to do what it does in a constitutionally valid manner.

[68] The majority of the Court of Appeal fell into the same error when it concluded, as part of its characterization inquiry, that the scheme’s purpose and effects reveal an “impermissible degree of federal jurisdictional overreach” (para. 373). This is the language of classification; the characterization step of the analysis must focus exclusively on the “pith and substance” or “dominant characteristic” of the law.

(3) The Presumption of Constitutionality

[69] The presumption of constitutionality “remains a cardinal principle of our division of powers jurisprudence” (*Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, at para. 79; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 255; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pp. 687-88; *Reference re Firearms Act*, at para. 25; see also *Severn v. The Queen* (1878), 2 S.C.R. 70, at p. 103; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 81). Several consequences flow from the

application of the presumption of constitutionality in federalism cases. Two of these consequences are germane for our purposes.

[70] First, according to this presumption, “every legislative provision is presumed to be *intra vires* the level of government that enacted it” (*Murray-Hall*, at para. 79; P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 15:13). In other words, a court should approach any question as to the validity of legislation “on the assumption that it was validly enacted”, unless the party challenging the validity of the legislation demonstrates otherwise (*McNeil*, at pp. 687-88; *Reference re The Farm Products Marketing Act*, at p. 255; *Murray-Hall*, at para. 80).

[71] Second, the presumption of constitutionality functions as a principle of statutory interpretation. It directs a court to assume that “a legislative body does not intend to exceed its powers under the Constitution” (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 103). As this Court explained in *McKay v. The Queen*, [1965] S.C.R. 798, at pp. 803-4:

... if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted.

[72] Therefore, when characterizing a challenged law, a court faced with “competing, plausible characterizations . . . should normally choose that one that would support the validity of the law” (Hogg and Wright, at § 15:13; see also *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 33; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 28). And “where a law is open to both a narrow and a wide interpretation, and under the wide interpretation the law’s application would extend beyond the powers of the enacting legislative body, the court should ‘read down’ the law so as to confine it to those applications that are within the power of the enacting legislative body” (Hogg and Wright, at § 15:13).

[73] I emphasize, however, that the presumption of constitutionality is not an impermeable shield that protects legislation from constitutional review by courts. Nor can courts employ the presumption of constitutionality to rewrite legislative text as they see fit in order to bring it into compliance with the Constitution. Courts cannot rely on the presumption of constitutionality to disregard a statute that speaks clearly and is *ultra vires* its enacting body. As Justice Gonthier held in *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 66, the presumption of constitutionality “only applies when both competing interpretations are reasonably open to the court”. In that case, Justice Gonthier declined to interpret the impugned provisions as being consistent with constitutional norms because doing so “would be repugnant to the text and context of the federal legislation” (para. 66; see also *McKay*, at pp. 803-4; J. M. Keyes and C. Diamond, “Constitutional Inconsistency in

Legislation — Interpretation and the Ambiguous Role of Ambiguity” (2017), 48 *Ottawa L. Rev.* 313, at pp. 321-22). Thus, while the presumption of constitutionality is a “cardinal principle” that must be borne in mind, it does not displace the duty of courts to meaningfully review the constitutionality of legislation.

[74] Similarly, a court cannot circumvent its duty to meaningfully review the constitutionality of legislation by suggesting that, insofar as an administrative decision maker applies a law unconstitutionally, the application of that law may be judicially reviewed. The constitutional validity of a law and its administrative application are distinct concepts. Where a constitutionally valid law grants a decision maker broad and imprecise discretion, that discretion must be exercised reasonably and in accordance with the purpose for which it was given (*References re GGPPA*, at para. 73). But where a law is ultra vires and therefore unconstitutional, it cannot be saved by the prospect of administrative judicial review. As Justice La Forest explained in *Hydro-Québec*, at para. 73:

. . . the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all. [Emphasis in original.]

[75] With these governing principles in mind, I now turn to the characterization of the impugned scheme.

B. *The Application of the Governing Principles*

[76] In my view, a careful analysis of the purpose and effects of the impugned statute and Regulations reveals that the scheme they establish has two distinct components: one dealing with “designated projects” and another addressing projects carried out or financed by federal authorities on federal lands or outside Canada. In my view, the pith and substance of the “designated projects” component of the scheme is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts. By contrast, the pith and substance of the secondary component in ss. 81 to 91 is to direct the manner in which federal authorities that carry out or finance a project on federal lands or outside Canada assess the significant adverse environmental effects that the project may have.

[77] I will begin my analysis with the purpose of the scheme as revealed by the intrinsic evidence.

(1) Purpose

(a) *Intrinsic Evidence*

[78] As this Court has previously noted, courts have “frequently used a statute’s title as a tool for the purposes of characterization” (*References re GGPPA*, at para. 58; see also *Reference re Genetic Non-Discrimination Act*, at para. 35). The short title of the impugned statute is “*Impact Assessment Act*” (s. 1). The long title is “*An Act*

respecting a federal process for impact assessments and the prevention of significant adverse environmental effects". The short title is relatively broad in scope, as it speaks not of environmental assessment but rather of impact assessment, which presumably includes within its ambit domains other than the environment. The long title would, by contrast, seem to indicate a fairly tailored scheme. It indicates that the federal process is designed to prevent those environmental effects that are both significant and adverse.

[79] Although the long title of the statute suggests a tailored scheme, its preamble and stated purposes sweep far more broadly. The preamble to the *IAA* proclaims Canada's commitments to, *inter alia*, "fostering sustainability", "providing Canadians with the opportunity to participate in [the impact assessment] process", and "ensuring respect for the rights of the Indigenous peoples of Canada . . . and . . . fostering reconciliation". Section 6(1) sets out the *IAA*'s 15 purposes, as follows:

6 (1) The purposes of this Act are

(a) to foster sustainability;

(b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;

(b.1) to establish a fair, predictable and efficient process for conducting impact assessments that enhances Canada's competitiveness, encourages innovation in the carrying out of designated projects and creates opportunities for sustainable economic development;

(c) to ensure that impact assessments of designated projects take into account all effects — both positive and adverse — that may be caused by the carrying out of designated projects;

(d) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects;

(e) to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each — and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;

(f) to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;

(g) to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act;

(h) to ensure that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment;

(i) to ensure that an impact assessment is completed in a timely manner;

(j) to ensure that an impact assessment takes into account scientific information, Indigenous knowledge and community knowledge;

(k) to ensure that an impact assessment takes into account alternative means of carrying out a designated project, including through the use of best available technologies;

(l) to ensure that *projects*, as defined in section 81, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;

(m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments; and

(n) to encourage improvements to impact assessments through the use of follow-up programs.

[80] Thus, the stated purposes of the *IAA* — evidenced in its preamble and in s. 6 — are considerably broader than the long title of the *IAA* might suggest. Though the long title refers to “environmental effects”, the intrinsic evidence, taken together, indicates a broader approach to assessing “impacts” — including but not limited to environmental impacts. In particular, s. 6 confirms that the *IAA* uses a wide lens, aiming to take into account “all effects — both positive and adverse” (s. 6(1)(c)) — in order to provide protection from the “adverse effects caused by a designated project” (s. 6(1)(b)).

[81] In sum, the intrinsic evidence reveals that the scheme encompasses both procedural and substantive components of impact assessment. It establishes an information-gathering process in the service of an ultimate decision-making function.

(b) *Extrinsic Evidence*

[82] The extrinsic evidence supports the notion that the purpose of the *IAA* and the Regulations is to establish a preventative, project-based impact assessment and regulatory regime to identify potential changes to the environment or to health, social or economic conditions, and to mitigate or prevent these changes.

[83] In February 2018, the Minister of Environment and Climate Change moved for a second reading of Bill C-69 and made several comments about the bill’s purpose. In her remarks, the Minister identified the central purpose of the bill as follows:

Bill C-69 aims to restore public trust in how the federal government makes decisions about major projects, such as mines, pipelines, and hydro dams. These better rules are designed to protect our environment while improving investor confidence, strengthening our economy, and creating good middle-class jobs. They will also make the Canadian energy and resource sectors more competitive.

(*House of Commons Debates*, vol. 148, No. 264, 1st Sess., 42nd Parl., February 14, 2018, at p. 17202)

[84] The first theme that runs through the extrinsic evidence is that the impact assessment process is designed to account for more than just the environmental effects of a proposed project. In the 2017 *Discussion Paper*, the federal government outlined a number of possible changes to the environmental assessment and regulatory processes, including that “Canada’s new environmental assessment system must consider impacts on more than just the environment” (p. 13). This broader focus was echoed in the report of the Expert Panel, which recommended a process that would “move beyond the bio-physical environment to encompass all impacts, both positive and negative, likely to result from a project” (p. 13).

[85] At second reading in the House of Commons, the Minister indicated that impact assessments under Bill C-69 would examine matters such as “health, social, gender, and economic impacts over the long term as well as the impacts on indigenous peoples” (*House of Commons Debates*, February 14, 2018, at p. 17203). Similarly, the Parliamentary Secretary to the Leader of the Government in the House of Commons stated that the bill was born of the recognition “that we need to respect our environment,

take into consideration all the factors at play and look at the economic benefits and the national interest” (p. 17211).

[86] The Minister expanded on this theme in her remarks to the Standing Committee on Environment and Sustainable Development. She stated that, in making decisions as to whether a project is in the public interest, the executive branch would consider such factors as “whether companies are using the best available technologies and practices to reduce impacts on the environment” and the results of a “gender-based analysis” designed to ensure that potential impacts on “women, men, or gender-diverse people are identified and addressed” (House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, No. 99, 1st Sess., 42nd Parl., March 22, 2018, at p. 2).

[87] A second theme that emerges from the record is that the federal scheme was designed to not only *gather information* about the impacts of a proposed project but also to grant the executive branch a *decision-making power*. In its 2017 *Discussion Paper*, the federal government referred to the forthcoming scheme as involving “environmental assessment and regulatory processes” that would culminate in “Regulatory Decision(s)” and ongoing monitoring, compliance, enforcement and follow-up (pp. 3 and 8). At second reading, the Minister explained that the aim would be to ensure that “good projects go ahead in a timely way to create new jobs and economic opportunities for the middle class” and that “the final decision on major projects will rest with me or with the federal cabinet” (*House of Commons Debates*,

February 14, 2018, at p. 17203). Impact assessment thus provides the foundation for an ultimate decision by the executive branch.

[88] The Minister did not speak as extensively about the Regulations but did mention that the Project List would identify those projects “that have the most potential for adverse effects in areas of federal jurisdiction related to the environment” (Standing Committee on Environment and Sustainable Development, at p. 18; see also Regulatory Impact Analysis Statement).

[89] This Court has observed that parliamentary debates should be approached with caution. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35, this Court noted that the “frailties of Hansard evidence are many”, though it recognized that such evidence “can play a limited role in the interpretation of legislation”. In *Morgentaler*, Sopinka J. noted the criticism that Hansard evidence “cannot represent the ‘intent’ of the legislature, an incorporeal body”, and cautioned that courts must remain “mindful of the limited reliability and weight of Hansard evidence” (p. 484). Courts must approach parliamentary debates with great care, acknowledging that the record will often be full of contradictory statements, that speakers may make inadvertent errors in presenting and discussing legislation and that it is bad practice to cherry-pick seemingly helpful passages from the record.

[90] In the current case, however, a consideration of this extrinsic evidence confirms what is already apparent from the intrinsic evidence: that the scheme is designed to identify potential changes not just to the environment, but also to health,

social or economic conditions, and that it grants the executive branch broad impact assessment powers as well as an ultimate decision-making power.

[91] Reading the intrinsic and extrinsic evidence together, I conclude that the scheme articulates a broad array of purposes, including protecting the environment and fostering sustainability; satisfying Canada’s environmental obligations; assessing and regulating the broad effects of certain physical activities, such as effects on health, social and economic conditions; facilitating the participation of Indigenous peoples and the public; and establishing an efficient and transparent process. To achieve these purposes, the scheme not only involves information gathering but also has a regulatory component.

(2) Effects

(a) *Legal Effects*

[92] Legal effects flow directly from each step in the operation of the “designated projects” portion of the scheme: the designation of physical activities as “designated projects” and the three phases of the impact assessment process (planning, impact assessment and public interest decision making). Certain legal effects also flow from ss. 81 to 91 of the *IAA*, which deal with physical activities carried out on federal lands or outside Canada. I will address each cluster of effects in turn.

(i) Designation

[93] Two principal effects flow from the designation of a physical activity as a “designated project”. First, the designation process brings certain major projects within the scheme’s ambit. A direct effect of a project having been designated, therefore, is that it becomes subject to the scheme’s application and, at the very least, will be required to proceed through the planning phase.

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

[95] In practice, these effects-based prohibitions serve to pause all projects immediately upon designation. This pause applies to both designated physical activities and “any physical activity that is incidental to those physical activities” (s. 2). The restrictions on acts that may cause a “change” or “impact” encompass both positive and

adverse changes of any magnitude. And, as a qualitative matter, it is difficult to envision a proposed major project in Canada that would not involve any activities that “may” cause at least one of the enumerated effects.

[96] For example, the prohibition on doing any act that may cause “a change to the environment” in another province *prima facie* captures any act that may result in greenhouse gas emissions, which “represent a pollution problem that is not merely interprovincial, but global, in scope” (*References re GGPPA*, at para. 173). Similarly, Alberta submits that the prohibition on doing any act that may cause an effect on Indigenous peoples’ traditional land use would bar any physical activity associated with a designated project proposed to be carried out on provincial lands where traditional use is asserted by Indigenous peoples (s. 7(1)(c)(ii)).

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

(ii) The Planning Phase

[98] Two principal legal effects flow from the scheme's planning phase. First, the proponent of a designated project must provide a detailed project description that includes the information prescribed by regulations (*IAA*, s. 10; *Information and Management of Time Limits Regulations*, Sch. 1). Sections 19 to 24 of Schs. 1 and 2 of the *Information and Time Management Regulations* require the proponent to provide information about the project's potential effects, including effects within federal jurisdiction, an estimate of greenhouse gas emissions, and a list of the types of waste and emissions that are likely to be generated.

[99] Second, the effects-based prohibitions and the decision-based prohibition remain in effect throughout the planning phase (*IAA*, ss. 7 and 8). The Agency may grant an exception to the effects-based prohibitions to allow the proponent to do an act or thing for the purpose of providing the Agency with information (s. 7(3)(c)). Absent such an exception, however, the project is put on hold until the Agency is satisfied that it has sufficient information to decide whether an impact assessment is required pursuant to s. 16(1). If the Agency decides that an impact assessment is not required, the ss. 7 and 8 prohibitions are lifted and the impact assessment process comes to an end (ss. 7(3)(a) and 8(a)). If an impact assessment is required, the project moves to the next phase.

(iii) The Impact Assessment Phase

[100] The legal effects flowing from this phase of the scheme are similar to those flowing from the planning phase. First, the proponent must provide the Agency with

the information or studies that it requires within the prescribed time (s. 19(1)). Second, the project remains subject to the ss. 7 and 8 prohibitions.

(iv) The Decision-Making Phase

[101] The assessment process culminates in the Minister's decision statement. If the decision maker determines that the adverse "effects within federal jurisdiction" or the adverse "direct or incidental effects" are in the public interest, the Minister can impose binding conditions in relation to those effects (s. 64). If the proponent complies with these conditions, the effects-based prohibitions are lifted (s. 7(3)(b)). The s. 8 decision-based prohibition is also lifted by the issuance of a positive decision statement (s. 8(b)). Through the imposition of binding conditions, however, the federal executive's oversight of the project continues, even where it determines that the adverse effects are in the public interest.

[102] On the other hand, if the decision maker determines that the adverse "effects within federal jurisdiction" or the adverse "direct or incidental effects" are not in the public interest, this marks the end of the road for the proposed project. The effects-based and decision-based prohibitions remain in effect indefinitely, and the threat of steep fines for committing the strict liability offence of failing to comply with them persists. The scheme does not provide for the imposition of any conditions in the case of a negative decision statement.

(v) Sections 81 to 91: Non-Designated Projects on Federal Lands or Outside Canada

[103] As discussed, a key feature distinguishing this secondary scheme from the “designated projects” scheme is that assessments under ss. 81 to 91 are conducted by the federal authority with primary regulatory decision making responsibility for the project rather than by the Agency or a review panel. The principal legal effect of this secondary scheme is that it requires federal decision makers to consider the environment in discharging their existing duties. In this way, the scheme is similar to the 1984 Guidelines Order.

(b) *Practical Effects*

[104] In contrast to legal effects, practical effects are the “actual or predicted results of the legislation’s operation and administration” (*Morgentaler*, at p. 486). The practical effects of a law may shed light on its essential character (*Canadian Western Bank*, at para. 26; *Reference re Genetic Non-Discrimination Act*, at paras. 30 and 51; *References re GGPPA*, at para. 51). But in some cases, a law’s practical effects will not be particularly helpful in the characterization exercise (*References re GGPPA*, at para. 78). Ultimately, it is not for this Court to assess the effectiveness of the scheme or to attempt to predict its practical consequences in the absence of relevant evidence (para. 78).

[105] In this appeal, a number of interveners offered submissions about the practical effects of the scheme in the context of their operations and industries (e.g., I.F., Attorney General of Ontario, at paras. 24-26; I.F., Attorney General of Quebec, at para. 27; I.F., Business Council of Alberta, at paras. 3-5 and 32-41; I.F., Canadian Association of Petroleum Producers, at paras. 24 and 28-30; I.F., Canadian Taxpayers Federation, at paras. 5 and 37-40; I.F., Hydro-Québec, at paras. 4 and 11; I.F., Indian Resource Council, at paras. 28-31). Though these practical effects are not determinative of the scheme's pith and substance, I pause to note that the scheme gives rise to two general practical effects.

[106] First, the scheme results in delays of indeterminate duration (C.A. reasons, at paras. 358-61 (majority) and at para. 590 (dissent)). While each discrete phase of the impact assessment process is time-limited, the executive branch has the discretion to extend the time limits, sometimes indefinitely. For example, during the decision-making phase, a decision statement must be issued within a set time frame (s. 65(3) and (4)). But the Minister can extend that set time frame for any reason the Minister deems necessary (s. 65(5)), and the Governor in Council can, on the Minister's recommendation, extend the extension any number of times (s. 65(6)).

[107] A second practical effect is that the impact assessment process requires the Agency, the project proponent, federal authorities and other implicated jurisdictions to expend resources. It should be noted that the *IAA* envisions some degree of cooperation with other jurisdictions and thus can avoid duplication in certain circumstances. A

frequent refrain in government publications and during the legislative debates was that there should be “one project, one assessment” and that there was a need to embrace cooperation and reduce red tape and duplication (see, e.g., *2017 Discussion Paper*, at p. 17; Expert Panel, at pp. 22-26; *House of Commons Debates*, vol. 148, No. 267, 1st Sess., 42nd Parl., February 27, 2018, at p. 17412 (Hon. Jim Carr)). However, the *IAA*’s substitution provisions practically ensure that the “one assessment” will be federal, at least in substance. Substitution is permitted only if the substituted process considers the mandatory factors listed in s. 22 of the *IAA*, and even then, the Agency may require the proponent to provide additional information before a federal public interest decision statement is issued (ss. 31(1), 33(1) and 35).

[108] Considering the legal and practical effects together, I conclude that the scheme establishes a comprehensive information-gathering and regulatory process. From the designation stage through to the ultimate public interest determination, the *IAA* places broad temporary holds on the designated project. Following the public interest determination, the *IAA* continues to regulate the designated project with a view to mitigating or preventing its effects. The *IAA* also grants the executive branch broad regulatory powers and discretion by, for example, allowing the Governor in Council or the Minister to extend time limits.

(3) Conclusion on Characterization

[109] In sum, having considered the intrinsic and extrinsic evidence of purpose as well as the legal and practical effects of the scheme, I conclude that it contains two

distinct components. The pith and substance of the first component of the scheme, the “designated projects” component, is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts. The pith and substance of the second component, set out in ss. 81 to 91 of the *IAA*, is to direct the manner in which federal authorities that carry out or finance a project on federal lands or outside Canada assess the significant adverse environmental effects that the project may have.

VII. Step 2: Classification

A. *The Governing Principles*

(1) General Principles

[110] After a court characterizes the matter of a law, it “must determine the ‘class[es] of subjects’ into which the matter falls” (*Desgagnés Transport*, at para. 38, quoting *Quebec (Attorney General) 2015*, at para. 29). The court does so “by reference to the heads of power set out in the Constitution” (*References re GGPPA*, at para. 114). If the matter of the law is “properly classified as falling under a head of power assigned to the adopting level of government, the legislation is *intra vires* and valid” (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 65).

[111] Canadian federalism recognizes the diversity of the original members of the Canadian Confederation (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at

p. 132; *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 441-42; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 43; *Canadian Western Bank*, at para. 22; *Consolidated Fastrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at para. 29). The constitutional division of powers fosters this diversity within a single nation (*Canadian Western Bank*, at para. 22). Sections 91 and 92 of the *Constitution Act, 1867* confer broad legislative powers on provincial legislatures while granting the “powers better exercised in relation to the country as a whole” to the federal Parliament (*Canadian Western Bank*, at para. 22).

[112] Each head of power has been assigned to one level of government (or, exceptionally, assigned concurrently to both levels (ss. 92A(3), 94A and 95)). Only the level of government to which a head of power has been assigned can validly legislate in respect of matters falling within that head of power. The burden is on the party challenging the validity of a law to establish that it is *ultra vires* the enacting level of government (see Hogg and Wright, at § 15:13; see also *McNeil*, at pp. 687-88; *Rogers Communications*, at para. 81).

[113] A law is classified based on its main thrust or dominant characteristic, and its secondary effects are not the focus of the validity analysis (*Canadian Western Bank*, at para. 28). The fact that a valid law incidentally touches on a head of power belonging to the other level of government does not affect its validity. In other words, effects that are merely incidental — in the sense that they are “collateral and secondary to the

mandate of the enacting legislature” — will not “disturb the constitutionality of an otherwise *intra vires* law” (para. 28; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 28; *Rogers Communications*, at para. 37; *Quebec (Attorney General) 2015*, at para. 32).

(2) The Environmental Context

(a) *The “Environment” Is an Aggregate of Matters*

[114] Classifying environmental legislation presents a challenge because the “environment” is not a head of power under s. 91 or 92 of the *Constitution Act, 1867*. This Court has recognized that the environment is a “constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty” (*Oldman River*, at pp. 16 and 63-64; see also *Hydro-Québec*, at para. 86). Indeed, Professors Hogg and Wright observed that the environment is an “aggregate of matters” (§ 30:31; see also K. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (1996), at pp. 32-33).

[115] In *Oldman River*, Justice La Forest explained that environmental management “cuts across many different areas of constitutional responsibility . . . [and] could never be treated as a constitutional unit under one order of government . . . because no system in which one government was so powerful would be federal”

(pp. 63-64, quoting D. Gibson, “Constitutional Jurisdiction over Environmental Management in Canada” (1973), 23 *U.T.L.J.* 54, at p. 85; see also B. Downey et al., “Federalism in the Patch: Canada’s Energy Industry and the Constitutional Division of Powers” (2020), 58 *Alta. L. Rev.* 273, at pp. 286 and 312; J. Leclair, “L’étendue du pouvoir constitutionnel des provinces et de l’État central en matière d’évaluation des incidences environnementales au Canada” (1995), 21 *Queen’s L.J.* 37, at pp. 39-40; G. A. Beaudoin, “La protection de l’environnement et ses implications en droit constitutionnel” (1977), 23 *McGill L.J.* 207, at p. 224).

[116] Accordingly, neither level of government has exclusive jurisdiction over the whole of the “environment” or over all “environmental assessment” (*Oldman River*, at p. 65; *Hydro-Québec*, at para. 59, per Dickson C.J. and Iacobucci J., dissenting; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, 434 D.L.R. (4th) 213 (“*Reference re Environmental Management Act (BCCA)*”), at para. 93, aff’d 2020 SCC 1, [2020] 1 S.C.R. 3). Rather, this Court has acknowledged that both levels of government can legislate in respect of certain aspects of environmental protection, including certain aspects of the environmental assessment of physical activities (*Moses; Reference re Environmental Management Act (BCCA)*, at para. 93). Shared federal and provincial responsibility for environmental impact assessment is “neither unusual nor unworkable” (*Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 193). Rather, it is a central feature of environmental decision making in Canada (S. A. Kennett, “*Oldman* and

Environmental Impact Assessment: An Invitation for Cooperative Federalism” (1992), 3 *Const. Forum* 93, at p. 94).

[117] In *Moses*, for example, this Court recognized that both the federal and provincial governments can, in certain circumstances, validly exercise legislative jurisdiction over the same activity or project. Justice Binnie, writing for the majority, explained that, although a mining project considered in isolation might seem to fall within provincial jurisdiction over natural resources, a federal permit would nonetheless be required if that project placed fish habitat at risk (para. 36). Put simply, “[t]he mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal” (para. 36).

[118] This is consistent with the double aspect doctrine, which reflects the idea that the same fact situation can be regulated from different perspectives, one falling within s. 91 and the other falling within s. 92 (*References re GGPPA*, at paras. 129-30; *Desgagnés Transport*, at para. 84; *Hodge*, at p. 130; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 65; *Canadian Western Bank*, at para. 30; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at paras. VI-2.41 to VI-2.43).

[119] Many significant legislative matters cannot be reduced to one discrete subject. Indeed, Canadian governments must address complex and multifaceted issues that may fall within multiple heads of power (Downey et al., at p. 282). The double aspect doctrine explains how laws enacted by both the federal and provincial levels of

government may validly regulate the same fact scenario from different perspectives, pursuant to their respective heads of power. Overlaps of this nature are an inevitable and legitimate feature of the Canadian federal system (*Desgagnés Transport*, at para. 83; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 180-81; *Canadian Western Bank*, at paras. 36 and 42).

[120] Nonetheless, the double aspect doctrine must be applied with caution. First, not all fact situations have a double aspect, and each fact situation must be identified with precision. Environmental assessment of physical activities may or may not have a double aspect in relation to a specific project.

[121] Second, the fact that environmental assessment of physical activities may have a double aspect — with some elements falling within the legislative authority of each level of government — does not mean that it is an area of *concurrent* jurisdiction (*Reference re Securities Act*, at para. 66; *Desgagnés Transport*, at paras. 82-83; *Reference re Assisted Human Reproduction Act*, at para. 268-71, per LeBel and Deschamps JJ.; *Oldman River*, at pp. 71-72; Brun, Tremblay and Brouillet, at para. VI-2.41). If a fact situation can be regulated from both a federal perspective and a provincial perspective, it follows that each level of government can only enact laws which, in pith and substance, fall under its respective jurisdiction. In other words, both levels of government have the *exclusive* power to legislate within their respective jurisdictions, even if by doing so they both regulate the same fact situation (*Bell*

Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749, at p. 766).

[122] The notion that both levels of government may legislate in respect of certain aspects of environmental protection, each pursuant to its own legislative competence, is also consistent with the principle of cooperative federalism. This “more flexible view of federalism . . . accommodates overlapping jurisdiction and encourages intergovernmental cooperation” (*Reference re Securities Act*, at para. 57; see also *Reference re Pan-Canadian Securities Regulation*, at para. 17; *Rogers Communications*, at para. 85). However, “[w]hile flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers” or “make *ultra vires* legislation *intra vires*” (*Reference re Securities Act*, at paras. 61-62; *Reference re Pan-Canadian Securities Regulation*, at para. 18; *Rogers Communications*, at para. 39). The division of federal and provincial powers, including more recent additions such as exclusive provincial jurisdiction over non-renewable natural resources under s. 92A, is the product of negotiation and compromise. Courts may not, under the guise of cooperative federalism, “erode the constitutional balance inherent in the Canadian federal state” (*Reference re Securities Act*, at para. 62).

(b) *The Source and Scope of Jurisdiction Over Aspects of the Environment*

[123] The “constitutionally abstruse” nature of the environment means that legislative jurisdiction over the environment must be rooted in specific heads of power (*Oldman River*, at pp. 64-65; *Hydro-Québec*, at para. 154, quoting W. R. Lederman,

“Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975), 53 *Can. Bar Rev.* 597, at p. 610; *Attorney General of Quebec v. IMTT-Québec inc.*, 2019 QCCA 1598, 79 *Admin. L.R.* (6th) 1, at paras. 223-26). Since the heads of power differ in their nature and scope, the extent to which a level of government may address environmental concerns may vary from one head of power to another (*IMTT*, at para. 55; *Oldman River*, at p. 67).

[124] Some heads of power relate to *activities* — for example, Parliament can legislate in respect of pollution from ships pursuant to its jurisdiction over the activity of navigation and shipping (s. 91(10); *Oldman River*, at pp. 67-68; *Desgagnés Transport*, at para. 44). It can similarly legislate in respect of environmental issues arising from interprovincial works and undertakings, such as interprovincial railways or pipelines (ss. 91(29) and 92(10)(a); *Oldman River*, at p. 65; *Reference re Environmental Management Act* (BCCA), at para. 11). Provinces can legislate in respect of local works and undertakings, property and civil rights in the province, and matters of a local nature (s. 92(10), (13) and (16)).

[125] Other heads of power relate to what has been described as “management of a resource” — for example, in *Oldman River*, Justice La Forest viewed the fisheries power under s. 91(12) in this light (pp. 67-68). As another example, provinces can exclusively make laws in respect of non-renewable natural resources, forestry resources and electrical energy pursuant to s. 92A (see A. R. Lucas and C. Sharvit,

“Constitutional Powers”, in A. R. Lucas and R. Cotton, eds., *Canadian Environmental Law* (3rd ed. (loose-leaf)), 3-1, at § 3.13).

[126] These distinctions serve as convenient descriptors rather than fully explaining the scope of a head of power. Indeed, the same head of power can cover both activities and resources, depending on the fact situation. For example, the provinces’ jurisdiction over natural resources, forestry resources and electrical energy could be viewed as relating to activities when it is exercised to regulate the activity of developing these resources on provincial lands. Conversely, Parliament’s power to legislate in respect of navigation and shipping could be viewed as being in relation to “management of a resource” when it is exercised to regulate the impact of the construction of a bridge or dam on navigable waters (*Oldman River*; S. A. Kennett, “Federal Environmental Jurisdiction After *Oldman*” (1993), 38 *McGill L.J.* 180, at pp. 189-91). I also note that some heads of power, such as the criminal law power and the POGG power, have been used in relation to specific environmental matters (e.g., *Hydro-Québec*; *References re GGPPA*).

[127] The “activities” and “management of a resource” descriptors help to explain how a particular project may be validly regulated by both levels of government. An activity that seems to fall within a head of power assigned to one level of government may nevertheless have certain aspects — such as its impacts on certain resources — that can be regulated pursuant to a head of power assigned to the other level of government. Thus, for example, while the *activity* of constructing a mine falls

primarily within provincial jurisdiction, the construction's impacts on *resources* such as fisheries and navigable waters are aspects that may be regulated pursuant to federal legislative competence (*Moses*, at para. 36).

[128] In *Oldman River*, Justice La Forest cautioned that it is unhelpful to describe a project as a "provincial project" or as a project "primarily subject to provincial regulation", as this erroneously suggests that such projects are shielded from otherwise valid federal legislation (p. 68). I agree that it is important to avoid the impression that some projects fall within an enclave of exclusivity. Nonetheless, while both levels of government may have the ability to regulate different aspects of a given project, one level's jurisdiction may be broader than the other's. Recognizing that an activity is primarily regulated by one level of government highlights the fact that the pith and substance of any legislation enacted by the *other* level of government must be tailored to the aspects of the project that properly fall within the latter's jurisdiction.

B. *The Application of the Governing Principles*

[129] With the governing principles in mind, I now turn to classifying the matter of the impugned scheme. The question at this step is as follows: under which head or heads of power does the matter of the scheme fall? Because the environment is "constitutionally abstruse" and an aggregate of matters, the relevance of particular heads of power may vary with the context. In this appeal, absent a specific fact scenario, I will focus on determining whether the main thrust of the scheme is directed at federal matters.

[130] As I concluded following the characterization exercise, the impugned scheme contains two discrete components. As I will explain, the provisions of the *IAA* dealing with projects on federal lands or outside Canada are clearly *intra vires* Parliament. However, classifying the matter of the “designated projects” portion of the scheme is a more challenging task. I will deal first with this portion of the scheme.

(1) The “Designated Projects” Scheme

[131] As discussed, there is no doubt that Parliament can enact impact assessment legislation that is directed at the federal aspects of projects. The breadth of these “federal aspects” will vary with the circumstances. Where Parliament is vested with jurisdiction to legislate in respect of a particular *activity*, it has broad discretion to regulate that activity and its effects (*Oldman River*, at pp. 67-68; Harrison, at p. 36; Kennett (1993), at pp. 187-89). But Parliament’s jurisdiction is more restricted where the activity falls outside of its legislative competence; in these cases, it can validly legislate only from the perspective of the federal aspects of the activity, such as the *impacts* of the activity on federal heads of power. Federal legislation that is insufficiently tailored — that is, whose pith and substance is to regulate the activity *qua* activity, rather than only its federal aspects — is *ultra vires* (*Reference re Environmental Management Act* (BCCA), at paras. 98-101).

[132] The scheme treats all “designated projects” in the same way, regardless of whether Parliament is vested with broad jurisdiction over the activity itself or narrower jurisdiction over the activity’s impacts on federal heads of power. And many of the

physical activities to which the scheme applies are primarily regulated through the provincial legislatures' powers over local works and undertakings or natural resources. Parliament can enact impact assessment legislation to regulate these projects from a federal perspective, so long as the regulation of *federal aspects* represents the dominant characteristic of the law.

[133] Canada relies on four heads of power to support the “designated projects” scheme: sea coast and inland fisheries (s. 91(12)), “Indians, and Lands reserved for the Indians” (s. 91(24)), imperial treaties (s. 132) and the national concern branch of the POGG power (s. 91). It argues that the scheme’s grounding in these heads of power achieves the necessary tailoring and confines Parliament to its constitutional lane. The crux of Canada’s position is that the scheme targets “effects within federal jurisdiction” and “direct or incidental effects”, two defined terms in the *IAA* that are said to align with Parliament’s legislative jurisdiction under the *Constitution Act, 1867*.

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

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

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

[137] This analysis will proceed in two parts that correspond to these two overarching problems. First, setting aside my concerns about the scope of the defined “effects within federal jurisdiction”, I will consider the four decision-making junctures embedded in the scheme: (i) the designation of physical activities as “designated projects”; (ii) the screening decision; (iii) the delineation of the scope of the impact assessment and the factors to be considered therein; and (iv) the public interest decision and resulting regulation and oversight. As I will demonstrate, only some of these decision-making functions are constitutionally vulnerable. Nonetheless, I will address them in sequence to provide context and guidance.

[138] Thereafter, I will explain why, in my view, the defined “effects within federal jurisdiction” do not align with federal legislative jurisdiction. Rather, their overbreadth further dilutes the scheme’s already tenuous focus on the federal aspects of designated projects. In the result, the scheme invites the federal government to make decisions in respect of projects that it has no jurisdiction to regulate, at least from the perspective of the heads of power upon which it relies.

[139] As I have noted, the IAA addresses another subcategory of effects, “direct or incidental effects”, which are defined in part as “effects that are directly linked or necessarily incidental to . . . a federal authority’s provision of financial assistance to a

person for the purpose of enabling [a physical] activity or [designated] project to be carried out, in whole or in part” (s. 2). I will not discuss this defined term in great detail in the course of these reasons, except to note that, as Canada recognized, this part of the definition refers to the federal spending power. This defined term received little attention in this appeal, perhaps because, as Canada also acknowledged, the exercise of this federal spending authority would likely have to be considered in the context of the facts of a particular case.

[140] I turn now to the scheme’s first overarching problem.

(a) *The Defined Federal Effects Do Not Drive the Scheme’s Decision-Making Functions*

(i) Designation of Physical Activities as “Designated Projects”

[141] The designation mechanism brings certain physical activities within the scheme’s ambit. Alberta asserts that the designation mechanism is overbroad in two related ways. First, Alberta raises the concern that the Regulations do not draw a distinction between federal and local projects and, accordingly, “include several physical activities with no obvious ties to federal jurisdiction” (R.F., at para. 59). Second, Alberta submits that there are “no thresholds or criteria . . . with respect to the physical activities that the Governor in Council may designate in the *Regulations*” (para. 56).

[142] Alberta’s concerns about the scheme’s designation mechanism are, with respect, misplaced. The fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity. Even a “provincial” project may cause effects in respect of which the federal government can properly legislate. Accordingly, the inclusion in the Regulations of some “provincial” projects — in the sense that they involve activities primarily regulated by the provinces — is not itself problematic.

[143] Furthermore, the jurisprudence and academic literature make plain that a low threshold for the application of an impact assessment scheme is a practical necessity. In *Oldman River*, this Court described environmental assessment as a “planning tool” that offers “an objective basis for granting or denying approval for a proposed development” (p. 71). As a planning tool, impact assessment is necessarily prospective and launches from a point of informational uncertainty (Expert Panel, at pp. 18-19; J. MacLean, M. Doelle and C. Tollefson, “Polyjural and Polycentric Sustainability Assessment: A Once-in-a-Generation Law Reform Opportunity” (2016), 30 *J.E.L.P.* 35, at p. 43).

[144] It logically follows that “the full implications of proposed activities cannot be properly understood, if at all, until an assessment is well underway if not completed” (MacLean, Doelle and Tollefson, at pp. 39-40; see also A. Johnston, “Federal Jurisdiction and the *Impact Assessment Act*: Trojan Horse or Rational Ecological

Accounting?”, in Doelle and Sinclair, *The Next Generation of Impact Assessment*, 97, at pp. 104-5).

[145] The *IAA* expressly states that it must be administered in a manner that, among other things, applies the precautionary principle (s. 6(2)). This Court has previously referred to the precautionary principle when determining the validity of environmental legislation (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at paras. 31-32). This principle instructs that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation” (para. 31, quoting the *Bergen Ministerial Declaration on Sustainable Development* (1990), at para. 7).

[146] Requiring definitive proof that a project will have effects on areas of federal jurisdiction prior to an impact assessment would put the cart before the horse and undermine the precautionary principle (Johnston, at pp. 105-6). Therefore, in my view, the designation mechanism’s imperfect focus on federal effects is both practically necessary and constitutionally sound.

[147] Though I conclude that the designation mechanism, on its own, is unproblematic, I note that it is necessarily linked to the *IAA*’s definition of “effects within federal jurisdiction”. I will return to this definition, and to its influence on the designation mechanism and the balance of the scheme, later in my reasons.

(ii) The Screening Decision

[148] While all designated projects are subject to the IAA's planning phase, they are not automatically subject to an impact assessment. Rather, following the planning phase, the Agency is empowered to make a screening decision as to whether an impact assessment is required for a particular project.

[149] The Agency must decide whether an impact assessment of a designated project is required by taking into account the mandatory factors set out in s. 16(2):

(2) In making its decision, the Agency must take into account the following factors:

(a) the description referred to in section 10 and any notice referred to in section 15;

(b) the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects;

(c) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(d) any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12;

(e) any relevant assessment referred to in section 92, 93 or 95;

(f) any study that is conducted or plan that is prepared by a jurisdiction — in respect of a region that is related to the designated project — and that has been provided to the Agency; and

(g) any other factor that the Agency considers relevant.

[150] In my view, the Agency's broad discretion to require an impact assessment of a designated project demonstrates that the matter of the scheme exceeds the bounds of federal legislative competence. The decision to require an assessment must be rooted in the possibility of adverse federal effects (MacLean, Doelle and Tollefson, at pp. 44-45). This is a corollary of the scheme's broad designation mechanism: the wider the scheme casts its net, the more critical the funneling function of the screening decision becomes to keeping the overall scheme within the bounds of federal legislative powers. As drafted, the screening decision under s. 16(2) is not driven by possible federal effects and therefore fails to focus the scheme on the federal aspects of designated projects.

[151] The *IAA* requires the Agency to "take into account" an open-ended list of factors, all of seemingly equal importance. Only s. 16(2)(b) and (c) relate to adverse effects within federal jurisdiction and adverse direct or incidental effects. As a result, an impact assessment of a designated project could be required for reasons other than, or not sufficiently tied to, the project's possible impacts on areas of federal jurisdiction. Given the breadth of the considerations permitted to drive the screening decision, I am not satisfied that this decision performs the funneling function necessary to maintain the scheme's focus on federal impacts.

[152] Canada argues that the "key" decision-making factor is "the possibility that the carrying out of the designated project may cause Adverse Federal Effects" (A.F., at para. 92). This submission is not reflected in the text of s. 16(2), which gives no

primacy to the possibility of adverse effects relative to the other mandatory considerations.

[153] Canada also argues that “[w]here there is insufficient linkage to federal jurisdiction, a reasonable exercise of the Agency’s discretion under s. 16(1) will not require an impact assessment” (A.F., at para. 113). However, under s. 16(2), the discretion granted to the Agency is not limited to projects that may cause federal effects. The Agency can require projects with little or no possibility of federal effects to undergo an impact assessment on the basis of, for example, “any comments received . . . from the public”, regardless of whether such comments are in respect of areas of federal jurisdiction (s. 16(2)(d)). The *IAA*’s expansive purposes, set out in s. 6, do little to confine the exercise of this discretion.

[154] Due to the wide net cast by the scheme’s designation mechanism, the screening decision is constitutionally problematic. The risk is that projects with little or no potential for adverse federal effects will nonetheless be required to undergo an impact assessment on the basis of less relevant, yet mandatory, considerations. The fact that this decision is not driven by the likelihood of federal impacts demonstrates that the “main thrust” of the scheme strays from federal matters. I am unable to resort to the presumption of constitutionality in relation to s. 16 because its text, context, and purpose preclude a reasonable interpretation consistent with constitutional validity.

(iii) The Scope of Information Gathering and Assessment

[155] I turn next to the impact assessment phase of the scheme. The impact assessment must take into account the factors listed in s. 22(1) of the *IAA*:

22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:

(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including

(i) the effects of malfunctions or accidents that may occur in connection with the designated project,

(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and

(iii) the result of any interaction between those effects;

(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;

(c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(d) the purpose of and need for the designated project;

(e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;

(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;

(g) Indigenous knowledge provided with respect to the designated project;

(h) the extent to which the designated project contributes to sustainability;

- (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- (j) any change to the designated project that may be caused by the environment;
- (k) the requirements of the follow-up program in respect of the designated project;
- (l) considerations related to Indigenous cultures raised with respect to the designated project;
- (m) community knowledge provided with respect to the designated project;
- (n) comments received from the public;
- (o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;
- (p) any relevant assessment referred to in section 92, 93 or 95;
- (q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;
- (r) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition *jurisdiction* in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;
- (s) the intersection of sex and gender with other identity factors; and
- (t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.

[156] Alberta argues that the s. 22 factors go “significantly beyond matters with a clear connection to federal jurisdiction” (R.F., at para. 90). In its submission, this

broad list of factors demonstrates that the *IAA* is “far from focused on matters of federal jurisdiction” (para. 91).

[157] In my view, the assessment phase, on its own, does not involve an unconstitutional exercise of federal legislative authority. To understand why the assessment phase of the federal scheme is constitutionally compliant, it is necessary to distinguish between the concepts of environmental *assessment* on the one hand and environmental *decision making* on the other. As I will explain, the permissible scope of the former is wider than that of the latter. Although the federal government can legislate only in respect of activities over which it has jurisdiction or in respect of environmental effects that impact its areas of jurisdiction, it is not similarly limited in its information gathering and assessment. In other words, at the assessment stage, the federal government is not restricted to considering environmental effects that are federal in nature.

[158] In *Oldman River*, Justice La Forest explained that, when the federal government makes a decision about the acceptability of a proposed dam’s impacts on marine navigation, it must be able to look beyond those specific impacts in its cost-benefit analysis. Otherwise, as Justice La Forest warned, at p. 39:

... it seems to me that the Minister would approve of very few works because several of the “works” falling within the ambit of [the relevant provision] do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements

into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

[159] Since *Oldman River*, this Court has affirmed that the federal government, in conducting an environmental assessment, can gather information about effects beyond those that fall within federal jurisdiction (*National Energy Board*, at pp. 191 and 193; see also *MacLean, Doelle and Tollefson*, at pp. 44-45).

[160] Thus, while the federal government may have more limited room for manoeuvre in exercising its *decision-making* authority with respect to projects that affect federal areas of jurisdiction, it can *gather information* about a wide range of factors in conducting an environmental assessment. This broad information-gathering power is a natural by-product of the breadth and complexity of environmental regulation (see *Hydro-Québec*, at para. 134; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at p. 420; *Canadian Pacific*, at para. 43). In light of the interrelated nature of environmental matters, it would be both artificial and uncertain to limit the factors that can be studied or considered to those that are federal. What matters most is how the information is used at the decision-making stage.

[161] In the current case, therefore, the breadth of the factors listed in s. 22 of the *IAA* does not pose a constitutional issue. Whether a given project falls primarily under federal or provincial jurisdiction, the level of government undertaking an impact assessment has wide latitude to evaluate the project's anticipated effects. It is not

restricted to studying or gathering information about those effects that fall within its legislative jurisdiction.

(iv) Public Interest Decision

[162] The public interest decision lies at the heart of this scheme. The impact assessment process enables and is auxiliary to this decision (see *IMTT*, at para. 226; *Oldman River*, at p. 72). Accordingly, this Court must closely examine the provisions of the *IAA* that relate to the public interest decision stage (see Johnston, at p. 111).

[163] Sections 60 to 64 of the *IAA* appear below the heading “Decision-Making”. The operative question for the decision maker is “whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the [assessment] report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest” (ss. 60(1)(a), 61(1) and 62).

[164] Section 63 sets out the mandatory public interest factors that the decision maker must take into consideration:

63 The Minister’s determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council’s determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
- (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

[165] As discussed, the public interest decision dictates the nature and extent of ongoing federal oversight of a project. If the decision maker determines that the defined effects are in the public interest, the Minister must establish conditions with which the proponent of the project must comply, including the implementation of mitigation measures and follow-up programs (s. 64). The mandatory conditions must be “in relation to the adverse effects within federal jurisdiction” or “direct or incidental effects” (s. 64(1) and (2)). On the other hand, if the decision maker determines that the defined effects are not in the public interest, the Minister will issue a negative decision statement. This results in the continuation of the ss. 7 and 8 prohibitions and therefore amounts to placing a permanent hold on the project.

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

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

[168] Second, some factors are framed in relation to the assessment of the project *as a whole* rather than to the adverse “effects within federal jurisdiction”. To use the same example, s. 63(a) requires a consideration of “the extent to which the designated project contributes to sustainability”. Similarly, s. 63(e) requires a consideration of “the extent to which the effects of the designated project” — in other words, not only its federal effects — “hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change”.

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

[170] Two hypothetical scenarios illustrate this point. Consider a proposed mining project that, following an impact assessment, is understood to pose a potential risk to fish habitat and aquatic species. The mining aspect of the project is provincial, but the fisheries aspect is federal (*Moses*). Accordingly, the scheme requires the federal executive to decide whether the project's cumulative adverse impact on fish habitat and aquatic species is in the public interest.

[171] In the first hypothetical scenario, the decision maker considers the mandatory public interest factors listed in s. 63 and determines, under s. 63(a), that the overall effects of the designated project would contribute to sustainability. "[I]n light of" this contribution, the decision maker would conclude, under s. 60(1)(a) or 61(1),

that the cumulative impact on the fisheries is in the public interest, and would impose conditions to mitigate the adverse impact. The thrust of the decision and the force of federal regulation would clearly be aimed at protecting the fisheries through mitigation measures, follow-up programs, and any other conditions that the Minister considers appropriate under s. 64(1) and (4).

[172] In the second scenario, the decision maker determines, under s. 63(a), that the overall effects of the designated project would hinder sustainability. “[I]n light of” this adverse impact, the decision maker would conclude, under s. 60(1)(a) or 61(1), that the cumulative impact on the fisheries would not be in the public interest. The thrust of the decision and the force of federal regulation would no longer be driven by the fisheries aspect of the mine; rather, the fisheries aspect would have been subsumed into consideration of the project’s overall sustainability, an abstract concept that, much like the “environment”, is “constitutionally abstruse”. This is not to say that sustainability must never be considered in impact assessment. To the contrary, sustainability is a general guiding principle under this scheme that infuses the impact assessment process with a longer-term view for the benefit of both “present and future generations” (s. 2 “sustainability”). The concern in this second hypothetical scenario is that the presence of potential harm to the fisheries serves as the gateway to making a decision about the public interest in the project as a whole. Thus, rather than focusing on the fisheries, the Minister’s decision is predominantly focused on the regulation of the project *qua* project on the basis of its overall sustainability.

[173] This concern is less salient when the s. 63 factors are used to assess an activity that itself falls under federal jurisdiction. For example, as Justice La Forest recognized in *Oldman River*, if a federal decision maker were to assess an interprovincial railway project, its decision could be based on a variety of environmental and socio-economic concerns, including a general concern for sustainability (pp. 66-67). The federal decision maker could make an integrated decision that considers both adverse federal and non-federal effects, because the decision would ultimately be about an interprovincial railway under ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867*. This is the context in which Justice La Forest asserted that it “defies reason” for Parliament to be constitutionally barred from weighing broad environmental repercussions (p. 66). However, as I have explained, the IAA makes no distinction between the assessment of *activities* that fall under federal jurisdiction and the assessment of *impacts* of activities that are primarily regulated by the provinces.

[174] The hypothetical scenarios set out above demonstrate how the dominant thrust of the public interest decision-making process veers away from federal heads of power because there are so few constraints on how the s. 63 factors may be used. It is self-evident that adverse federal effects, considered in isolation, would rarely (if ever) be in the public interest (see *Oldman River*, at p. 39). My colleagues, in dissent, agree that “[t]o be in the public interest, adverse federal effects need to be outweighed by other *positive benefits of the project*” (para. 333 (emphasis in original)). In other words, adverse federal effects “must be outweighed on the other side of the ledger by public

interest factors in s. 63” (para. 293 (emphasis added)). But s. 63 expressly permits non-federal concerns to stack up on the “adverse” side of the ledger — regardless of whether the activity itself falls under federal jurisdiction — and thereby alter the fundamental character of the public interest decision. This shifts the dominant thrust of the decision away from the acceptability of adverse federal effects and directs it, instead, at the wisdom of proceeding with the project as a whole.

[175] I note that, under the *CEAA 2012*, the central question for the decision maker was not whether the adverse federal effects were in the public interest but rather whether they were “justified in the circumstances” (s. 52(2) and (4)). This language made it clear that *the circumstances* could be used to *justify* the adverse federal effects and thus render a positive decision; they could not be used to magnify the adverse federal effects and thus render a negative decision. This assurance is absent from the impugned statute’s decision-making provisions.

[176] In *Oldman River*, at p. 69, Justice La Forest explained that “[t]he practical purpose that inspires the legislation and the implications [the legislative body] must consider in making its decision . . . will not detract from the fundamental nature of the legislation”. But Justice La Forest was also mindful of the concern that a federal assessment scheme might function as 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” (pp. 71-72).

[177] For this scheme to be *intra vires*, it must be consistently focused on federal matters. As I have explained, it is both inevitable and permissible for the scheme's focus to broaden at the assessment stage. It would be artificial and ineffective to restrict the collection of information at the assessment phase to those components of the environment that are within federal jurisdiction. Nevertheless, at the ultimate decision-making juncture, the focus on federal impacts must be restored. Parliament can validly regulate only the impacts that fall within its jurisdiction or that arise from activities within its jurisdiction.

[178] In sum, even if one sets aside any concerns about the scheme's definition of "effects within federal jurisdiction", its core decision-making function is constitutionally problematic. The scheme requires the decision maker to consider a host of factors but does not specify how those factors are to drive the ultimate conclusion. As a result, the project's overall adverse effects, such as hindering sustainability broadly or Canada's climate change commitments, can substantiate a negative public interest decision. The scheme's decision-making mechanism thereby loses its focus on regulating federal impacts. Instead, it grants the decision maker a practically untrammelled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety.

(b) *As Defined, "Effects Within Federal Jurisdiction" Exceed Federal Jurisdiction*

[179] The constitutional frailties of the scheme’s decision-making functions are exacerbated by its focus on regulating an overbroad range of impacts. The mere fact that certain effects are defined as being “within federal jurisdiction” is, of course, not determinative of their status within the constitutional division of powers (*Desgagnés Transport*, at para. 137, per Wagner C.J. and Brown J., concurring). In my view, the defined “effects within federal jurisdiction” go far beyond the limits of federal legislative jurisdiction. This overbreadth reinforces the conclusion that the pith and substance of the scheme cannot be classified under federal heads of power.

[180] The overbreadth of the defined “effects within federal jurisdiction” is manifested in two distinct ways. First, the definition is central to the scheme’s decision-making functions. Its overbreadth dilutes the decision maker’s focus at the key decision-making junctures, shifting it away from federal aspects and encompassing aspects that are within provincial jurisdiction. Second, the defined “effects within federal jurisdiction” form the basis of the s. 7 prohibitions. Due to the overbreadth of these defined effects, the conduct prohibited by s. 7 extends beyond the range of conduct that Parliament can validly regulate pursuant to its assigned heads of power.

- (i) The Defined “Effects Within Federal Jurisdiction” Dilute the Decision Maker’s Focus at the Key Decision-Making Junctures

[181] As discussed, the scheme contains four decision-making junctures: (i) the designation of physical activities as “designated projects”; (ii) the screening decision; (iii) the delineation of the scope of the impact assessment and the factors to be

considered therein; and (iv) the public interest decision and resulting regulation and oversight. The definition of “effects within federal jurisdiction” is of central importance to most of these key decision-making junctures. First, it is on the basis of potential adverse “effects within federal jurisdiction” that some physical activities are designated as “designated projects” (s. 9(1); see also Regulatory Impact Analysis Statement). Second, the ultimate decision made under the scheme is, at least on its face, concerned with whether the adverse “effects within federal jurisdiction” are in the public interest (ss. 60(1) and 62). Finally, conditions imposed along with a positive public interest determination must be “in relation to the adverse effects within federal jurisdiction” (s. 64(1)).

[182] The defined “effects within federal jurisdiction” thus influence each of these key decision-making junctures. Due to the overbreadth of this definition, the scheme permits the Minister to designate a project based on effects that cannot be regulated from a federal perspective, to impose conditions in relation to these effects, or to declare these effects not to be in the public interest and put a permanent halt to the project as planned.

[183] For example, one of the “effects within federal jurisdiction” is “a change to the environment that would occur . . . in a province other than the one where the physical activity or the designated project is being carried out” (s. 2 “effects within federal jurisdiction” (b)(ii)). The breadth of this “interprovincial effects” clause is

astonishing. The *IAA*'s expansive definition of "environment" captures every component of the Earth (s. 2):

environment means the components of the Earth, and includes

(a) land, water and air, including all layers of the atmosphere;

(b) all organic and inorganic matter and living organisms; and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

[184] The "interprovincial effects" clause therefore captures an unlimited range of interprovincial environmental changes. This would include, for example, greenhouse gas emissions, which this Court has acknowledged "represent a pollution problem that is not merely interprovincial, but global, in scope" (*References re GGPPA*, at para. 173). As a result, the *IAA* expressly permits projects to be designated, assessments to be required and public interest decisions to be made on the basis that a project emits greenhouse gases that cross provincial and national borders.

[185] Canada submits that this clause of the definition is supported by the POGG power. Specifically, Canada relies on this Court's treatment of the POGG power as the basis for legislation aimed at preventing certain environmental harms. In *Crown Zellerbach*, this Court considered and applied the national concern branch of the POGG power to legislation that, in pith and substance, was aimed at preventing marine pollution (pp. 431-32 and 436-38). In *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, Justice Pigeon, for the majority, recognized that the federal

government can legislate in relation to the pollution of interprovincial rivers, which is a “pollution problem that is not really local in scope but truly interprovincial” (p. 514). Although Justice Pigeon did not explicitly refer to the POGG power, the application of that power explains the result (*References re GGPPA*, at para. 99).

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

[187] When pressed at the hearing of this appeal, Canada asserted that it is not relying on greenhouse gases as a basis for anchoring jurisdiction over major projects. It is plain, however, that the broadly worded “interprovincial effects” clause permits Canada to do just that.

[188] Furthermore, the record demonstrates that the federal government has adopted this very interpretation of “interprovincial effects”. For example, in a 2019 discussion paper, the federal government explained that onshore oil and gas projects would be included in the Regulations in part because “[p]rojects that process or consume large quantities of oil and gas have impacts in areas of federal jurisdiction due to their greenhouse gas emissions” (*Discussion Paper on the Proposed Project List: A Proposed Impact Assessment System*, May 2019 (online), at p. 10). In addition, the Minister has issued letters to project proponents pursuant to s. 17(1) of the *IAA* to advise that certain projects “would cause unacceptable environmental effects within federal jurisdiction”. Alberta directed this Court’s attention to two such letters, in which the sole “unacceptable environmental effects” were greenhouse gas emissions (*Letter from the Honourable Jonathan Wilkinson to Coalspur Mines (Operations) Ltd.*, June 11, 2021 (online); *Letter from the Honourable Steven Guilbeault to Suncor Energy Inc.*, April 6, 2022 (online)).

[189] Accordingly, while Canada asserts that it is simply relying on this Court’s prior holdings, it is, in substance, attempting to do an end run around this Court’s recent national concern jurisprudence. Our jurisprudence has recognized that preventing marine pollution and preventing pollution of interprovincial rivers are matters of national concern. However, Canada has made no attempt to apply the clarified national concern framework set out in the *References re GGPPA* or to lead any evidence on which to base the recognition of a new and broader matter of national concern (para. 133 and 162-66). With respect, neither have my colleagues, who simply assert

that the “interprovincial effects” clause is a matter of national concern without applying the legal framework or evidentiary requirements endorsed by this Court in the *References re GGPPA*.

(ii) The Defined “Effects Within Federal Jurisdiction” Result in Impermissibly Broad Prohibitions

[190] The overbreadth of the effects regulated by the scheme also influences the ongoing supervision and regulation imposed at the back end of the scheme. As discussed, the federal role in impact assessment does not end with the issuance of a decision statement. The scheme provides for ongoing supervision and regulation in the form of mandatory conditions (in the case of a positive decision statement) or prohibitions (in the case of a negative decision statement). The latter — specifically the effects-based prohibitions imposed by s. 7 — demonstrate the overbreadth of the defined “effects within federal jurisdiction”.

[191] Pursuant to s. 7, “the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause” any of the enumerated effects, which mirror the definition of “effects within federal jurisdiction”. These effects-based prohibitions play a dual role; they apply as a matter of course during the planning and assessment phases of the scheme, and they serve as an ongoing oversight mechanism following a negative decision statement.

[192] The s. 7 effects-based prohibitions may well be necessary for practical reasons during the planning and assessment phases of the impact assessment process, when the potential effects of a proposed project have yet to be identified. However, the indefinite application of these same prohibitions following a negative public interest decision statement raises significant concerns. I note that my colleagues disregard the dual role of the s. 7 prohibitions and focussing exclusively on the temporary “pause” these prohibitions impose during the planning and assessment phases. They do not address the ongoing regulatory function performed by s. 7 following a negative public interest decision and, as a result, they discount the overbroad and indefinite prohibitions imposed by the *IAA*.

[193] The indefinite s. 7 prohibitions forbid the proponent from doing any act or thing that may cause any “change” or “impact” specified in the provision. This prohibits causing any positive or negative changes or impacts of any magnitude. My colleagues, in dissent, assert that the term “a change” incorporates a significance threshold, such that it describes only changes that are “significant”, “non-trivial” or “more than *de minimis*”. This interpretation is untenable and is inconsistent with established principles of statutory interpretation. My colleagues point to their reading of the *IAA*’s purposes to support their novel interpretation, but as I have explained, the *IAA*’s purposes are considerably broader than my colleagues suggest. The sole reference to a significance threshold in the *IAA*’s extensive purpose clause is found in s. 6(1)(l), which relates to the distinct secondary scheme contained in ss. 81 to 91 of the *IAA*. Parliament has expressly incorporated a significance threshold into that

secondary scheme (e.g., ss. 82 to 84, 87, 88 and 90, all referring to “significant adverse environmental effects”). Had Parliament intended the “designated projects” scheme to target only “significant” changes, it could have similarly used that adjective in defining “effects within federal jurisdiction”. It did not do so. This Court must respect Parliament’s drafting choices and cannot amend the *IAA* as it sees fit. As this Court has held, “however generously one may interpret the statute, one cannot rewrite it” (*Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 90; see also *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 53; *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273, at para. 32; *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 36; *R. v. Khill*, 2021 SCC 37, at para. 73; M. Mancini, “The Purpose Error in the Modern Approach to Statutory Interpretation” (2022), 59 *Alta. L. Rev.* 919, at pp. 921-22).

[194] As a result of the overbreadth of the “effects within federal jurisdiction”, which are mirrored in s. 7, the *IAA* prohibits the project proponent from doing *any* “act or thing in connection with the carrying out of the designated project, in whole or in part”, following a negative public interest determination. This is so even where federal legislative authority does not support such wide-ranging regulation of the proposed project. A few examples will illustrate this point.

[195] Following a negative decision statement, the proponent must not do any act or thing in connection with the carrying out of the project that “may cause . . . a change to . . . *fish and fish habitat*” (s. 7(1)(a)(i)). But in *Fowler v. The Queen*, [1980]

2 S.C.R. 213, this Court struck down a provision of the *Fisheries Act*, R.S.C. 1970, c. F-14, that prohibited the deposit of logging debris into water frequented by fish because the provision made “no attempt to link the proscribed conduct to actual or potential harm to fisheries” (p. 226; see also Hogg and Wright, at § 30:26). Were Parliament to amend the *Fisheries Act* to include a prohibition against doing “any act or thing that may cause a change to fish or fish habitat”, the prohibition would be invalid for the same reason. Yet this is precisely the prohibition that s. 7 imposes.

[196] Similar issues arise with respect to the prohibitions related to the health, social and economic conditions of Indigenous peoples and Indigenous cultural heritage (s. 7(1)(c) and (d)). I acknowledge that the unique position of Indigenous peoples means that designated projects may affect them differently than other residents of a province and that, by virtue of s. 91(24) of the *Constitution Act, 1867*, the federal government is “vested with primary constitutional responsibility for securing the welfare” of Indigenous peoples (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 176). Nonetheless, the scheme’s indefinite prohibitions, following a negative decision statement, on any act or thing that may have “an impact” on or cause “any change” to these areas overshoot Parliament’s legislative authority under s. 91(24).

[197] To place these prohibitions in context, it is useful to recall that there are specific provisions in the *IAA* for projects on federal lands, including reserves under the *Indian Act*, R.S.C. 1985, c. I-5 (s. 82), and projects that require the exercise of a

federal power, duty or function or that involve federal funding (s. 8). Accordingly, the s. 7 prohibitions must be aimed at capturing privately or provincially funded projects that are on provincial lands and that do not otherwise require the exercise of a federal power, duty or function.

[198] Section 7(1)(c) prohibits doing any act or thing in connection with the carrying out of a designated project that may cause, “with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance”. This prohibition is cast broadly, capturing both positive and adverse impacts of any magnitude that are caused by any change (again, positive or adverse) to any component of the Earth.

[199] Section 7(1)(d) is also framed as a broad and general prohibition. It prohibits doing any act or thing that may cause “any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada”. While s. 7(4) provides an exception for changes that are non-adverse where the “council, government or other entity that is authorized to act on behalf of the Indigenous group, community or people” consents, this does little to narrow the prohibition. Section 7(1)(d) continues to bar any acts that may cause a combination of adverse and

non-adverse changes, even with the consent of the affected Indigenous group, community or people.

[200] Ultimately, these provisions do not bring the matter of the scheme within the scope of s. 91(24). The indefinite prohibition on acts that may cause even trivial or non-adverse impacts is inconsistent with s. 91(24)'s focus on protection of and concern for the welfare of Indigenous peoples (*Delgamuukw*, at para. 176).

[201] Finally, a proponent is prohibited from doing anything in connection with the carrying out of a project that would cause “a change” to “*migratory birds*”, as that term is defined in s. 2(1) of the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22 (s. 7(1)(a)(iii)). Canada submits that this prohibition flows from Parliament's power to implement “Treaties between the Empire and . . . Foreign Countries” under s. 132 of the *Constitution Act, 1867*. Neither of the parties devoted much attention in their written or oral submissions to this prohibition or to Canada's reliance on s. 132.

[202] The original convention entered into by the British Empire and the United States was the *Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, August 16, 1916, [1917] Gr. Brit. T.S. No. 7 (Cd. 8476). Canada and the United States later amended that convention in 1995 through a protocol (*Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, Can. T.S. 1999

No. 34). Canada then implemented the protocol domestically through the *Migratory Birds Convention Act, 1994*.

[203] It is far from obvious that s. 132 covers the substantial amendments made by Canada to an imperial treaty. Even if this were the case, the matter of the “designated projects” scheme cannot be said to fall within federal jurisdiction. Given my conclusion that the matter of that scheme cannot be classified as falling under s. 91(12), s. 91(24) or the POGG power, federal legislative jurisdiction with respect to migratory birds “is not sufficient by itself to support the constitutional validity” of the s. 7 prohibition or the *IAA* more broadly (see *Crown Zellerbach*, at p. 422). The “designated projects” scheme does not, in pith and substance, relate exclusively to the implementation of a British Empire treaty for the protection of migratory birds.

(c) *Conclusion on the Classification of the “Designated Projects” Regulatory Scheme*

[204] In sum, I am satisfied that the matter of the “designated projects” scheme cannot be classified under federal heads of power and that the scheme is therefore *ultra vires*. Its pith and substance is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts. It exceeds the bounds of federal jurisdiction for two overarching reasons. First, even if this Court were to accept Canada’s submission that the defined “effects within federal jurisdiction” are within federal jurisdiction, these effects do not drive the scheme’s decision-making functions. Consequently, the scheme is not in pith

and substance directed at regulating these effects. Second, I do not accept Canada's submission that "effects within federal jurisdiction" comport with federal legislative competence under s. 91 of the *Constitution Act, 1867*. As I have explained, this overbroad definition further dilutes the focus of the scheme's decision-making functions. It also extends the conduct prohibited by s. 7 beyond that which Parliament can validly regulate pursuant to its assigned heads of power.

[205] Rather, the "designated projects" scheme intrudes more than incidentally into the provinces' constitutional sphere. As I explained, that sphere encompasses exclusive legislative jurisdiction to regulate in areas including property and civil rights in the province (s. 92(13)), matters of a local nature (s. 92(16)), local works and undertakings (s. 92(10)), and non-renewable natural resources, forestry resources, and electrical energy (s. 92A).

[206] As I emphasized at the outset, it is clear that Parliament can enact legislation to protect the environment under the heads of power assigned to it in the *Constitution Act, 1867*. It is also open to Parliament to enact an impact assessment scheme as part of its laudable pursuit of environmental protection and sustainability. In this respect, I am in agreement with my colleagues, in dissent, as well as Greckol J.A. in the Court of Appeal. However, such a scheme must be consistently focused on federal matters. At certain stages of an impact assessment process, the focus on federal matters will necessarily be imperfect or imprecise. Projects ought to be designated based on their *potential* effects on areas of federal jurisdiction because, as I have

explained, requiring definitive proof of such effects would put the cart before the horse. At the assessment stage, it would be both artificial and uncertain to limit the factors that can be considered to those that are federal. But, for the scheme to be *intra vires*, its main thrust must be directed at federal matters. The Agency's screening decision must be rooted in the possibility of adverse federal effects. The public interest decision must focus on the acceptability of the adverse federal effects. The scheme must ensure that, in situations where the activity itself does not fall under federal jurisdiction, the decision does not veer towards regulating the project *qua* project or evaluating the wisdom of proceeding with the project as a whole. Finally, the effects regulated by the scheme must align with federal legislative competence. When they exceed these bounds — as the “effects within federal jurisdiction” do — their overbreadth permeates the scheme's decision-making functions and prohibitions and thereby dilutes the scheme's focus on federal matters.

(2) The Scheme for Non-Designated Projects on Federal Lands or Outside Canada

[207] Having concluded that the “designated projects” component of the scheme is *ultra vires* Parliament, I now turn back to the secondary scheme contained in ss. 81 to 91 of the *IAA*. I have little trouble in concluding that this secondary scheme is *intra vires* Parliament.

[208] First, I note that these provisions have not been challenged as unconstitutional. The Court of Appeal impliedly accepted that this portion of the

scheme is *intra vires* when it reasoned that the inclusion “in this legislative scheme [of] two distinct regimes, one of which is constitutionally *intra vires*, does not enhance the constitutionality of the other” (para. 191). Though the Court of Appeal concluded that the scheme was *ultra vires* in its entirety, it provided no reasons for declining to separate out the “manifestly distinct” scheme established by ss. 81 to 91 (para. 191). I recognize that this may have been a consequence of Canada’s position on appeal that the scheme must stand or fall as a whole. Canada abandoned that position before this Court. Nonetheless, it remains the case that no serious challenge has been levelled against ss. 81 to 91.

[209] Second, and as discussed, the process established by ss. 81 to 91 resembles the Guidelines Order process that this Court upheld in *Oldman River*. The Guidelines Order, just like ss. 81 to 91, provided direction to federal authorities exercising their decision-making power in relation to projects that they undertook or funded themselves on federal lands or outside Canada. The federal government can consider all potential impacts of the projects it undertakes or funds and make decisions about those projects accordingly.

[210] In my view, though the test for severance in division of powers cases is stringent, ss. 81 to 91 can be separated from the balance of the scheme and upheld as constitutional. These provisions are not “inextricably bound up with the part declared invalid”, and “it can be assumed that the Legislature would have enacted” them on their own (*Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503

(P.C.), at p. 518; see also *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 46, per McLachlin C.J. and Major J., dissenting in part, but not on this point of law; *Reference re Assisted Human Reproduction Act*, at para. 18, per McLachlin C.J.).

[211] In light of the fundamental differences between ss. 81 to 91 and the “designated projects” portion of the scheme, this Court’s holding in *Oldman River* in respect of a scheme resembling the one in ss. 81 to 91, and the absence of any serious challenge to these provisions, I am satisfied that ss. 81 to 91 are constitutional and should not fall with the rest of the scheme.

VIII. Additional Issues

[212] Before concluding, I will deal briefly with two discrete arguments.

[213] First, Alberta has raised the doctrine of interjurisdictional immunity. It suggests that if the “designated projects” portion of the scheme is *intra vires*, then it is inapplicable to “intra-provincial projects” by virtue of this doctrine. As I have concluded that this portion of the scheme is *ultra vires*, I need not address this alternative argument.

[214] Second, I would not grant the motion to adduce fresh evidence made by the intervener the Attorney General of Ontario. The evidence relates to a provincial highway, Highway 413, which has been subject to the IAA’s planning phase since

May 3, 2021. Ontario has failed to establish that this evidence, “when taken with the other evidence adduced”, could reasonably be expected to have affected the result in this appeal (*Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775). The evidence does not demonstrate anything that is not already apparent from a close reading of the legislative scheme. Furthermore, in the circumstances of this case, I would decline to exercise this Court’s discretion to receive further evidence (see, e.g., *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 318; *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 62(3); *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 46(2)).

IX. Conclusion

[215] In my view, the reference questions should be answered in the affirmative. The federal impact assessment scheme, consisting of the *Impact Assessment Act* and the accompanying *Physical Activities Regulations*, is unconstitutional in part. Although the process set forth in ss. 81 to 91 of the *IAA* is constitutional and can be separated out, the balance of the scheme — that is, the “designated projects” portion — is *ultra vires* Parliament and thus unconstitutional. Accordingly, the appeal is allowed in part.

[216] As I stated at the outset, there is no doubt that Parliament can enact impact assessment legislation to minimize the risks that some major projects pose to the environment. This scheme plainly overstepped the mark. But it remains open to Parliament to design environmental legislation, so long as it respects the division of powers. Moreover, it is open to Parliament and the provincial legislatures to exercise

their respective powers over the environment harmoniously, in the spirit of cooperative federalism. While it is not for this Court to direct Parliament as to the way forward, I note “the growing practice of resolving the complex governance problems that arise in federations . . . by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts” (*Reference re Securities Act*, at para. 132). Through respect for the division of powers in Canada’s constitutional structure, both levels of government can exercise leadership in environmental protection and ensure the continued health of our shared environment (*Hydro-Québec*, at para. 154).

The following are the reasons delivered by

KARAKATSANIS AND JAMAL JJ. —

I. Introduction

[217] This reference asks for the Court’s opinion on whether the Parliament of Canada has the legislative jurisdiction under the *Constitution Act, 1867* to enact the modern federal environmental assessment regime in the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (“*IAA*”), and related *Physical Activities Regulations*, SOR/2019-285 (“*Regulations*”). In our view, the answer is yes. Both the *IAA* and *Regulations* are constitutional in their entirety.

[218] For decades, this Court has recognized that the Constitution is a framework for life and political action in Canada and must be interpreted to ensure that Canadian federalism operates flexibly (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007]

2 S.C.R. 3, at para. 42). Our jurisprudence instructs courts to approach both federal and provincial legislation from a posture of respect by applying a presumption that legislators enact laws with a good-faith intent to stay within the limits of their jurisdiction, and by interpreting legislation to comply with the Constitution when possible (*Canadian Broadcasting Corp. v. Quebec Police Commission*, [1979] 2 S.C.R. 618, at p. 641, citing *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 255; see also *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, at para. 79; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 28).

[219] To date, these themes have animated this Court’s environmental jurisprudence. The Court has stated that the environment, by its very nature, is broad, diffuse, and all-pervasive (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 37 and 64). Because the environment touches on federal and provincial heads of power, all levels of government bear an “all-important duty” to use their powers to protect the environment (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 86). This Court has also recognized that “[t]he social importance of environmental protection is obvious, yet the nature of the environment does not lend itself to precise codification” (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (“*Canadian Pacific*”), at para. 51). It has therefore warned that “a strict requirement of drafting precision” in the environmental protection context “might well undermine the ability of the legislature to provide for a comprehensive and flexible regime”, and “may

hinder, rather than promote, public understanding of what conduct is prohibited” (paras. 52-53).

[220] Interpreting the *IAA* and Regulations, and evaluating their constitutionality, requires the Court to continue in the tradition of flexibility, cooperation, and mutual respect that has characterized its recent federalism jurisprudence. The *IAA* and Regulations build on earlier federal environmental assessment regimes to establish a modern regulatory regime that allows federal authorities to assess the impacts of designated major projects and to determine whether they are in the public interest, despite their adverse effects in areas of federal jurisdiction. The *IAA* contains two distinct schemes: a primary scheme addressing physical activities designated as “designated projects”, which takes up most of the *IAA*, and a secondary scheme in ss. 81 to 91 that applies to federal projects. Like the majority of this Court, we focus on the designated projects regulatory scheme, because there is no dispute that the secondary scheme in ss. 81 to 91 for projects funded by the federal government or carried out either on federal lands or outside Canada is *intra vires* Parliament (paras. 207-11). Parliament undoubtedly has legislative jurisdiction to regulate projects that federal authorities undertake or fund (majority reasons, para. 209).

[221] As for the balance of the *IAA*, in enacting the designated projects regime, Parliament chose broad language for what constitutes an “effec[t] within federal jurisdiction” under the *IAA* — for example, any “change” to “*fish and fish habitat*” (s. 2 “effects within federal jurisdiction” (a)(i)). Parliament similarly chose general language

to detail the factors decision makers must consider in determining whether allowing a project's "direct or incidental effects" and "effects within federal jurisdiction" (collectively referred to below as "adverse federal effects") is in the public interest — for example, "sustainability" (s. 22(1)(h)). This approach is neither novel nor concerning.

[222] Like all regulatory regimes, the *IAA* scheme is constrained by the statute itself and by the Constitution. The *IAA*'s text, context, and purpose demonstrate that all major decisions under the federal impact assessment scheme must be based on a project's adverse effects within federal jurisdiction. The presumption that legislatures do not intend to exceed the constitutional limits on their authority confirms this interpretation. The breadth of the factors that may be considered under the *IAA* scheme simply ensures that federal authorities can make a fully informed decision on whether a project that adversely impacts areas of federal jurisdiction should be allowed to proceed based on identified and transparent public interest considerations. Federal authorities are directed to make an integrated decision that involves a cost-benefit analysis weighing the adverse federal effects against the project's other positive and negative effects.

[223] Interpreting the *IAA* with reference to its purpose and effects, consistently with this Court's cooperative, flexible approach to the division of powers, we conclude that the *IAA*'s subject matter is to establish an environmental assessment process to (1) assess the effects of major projects on federal lands, Indigenous peoples, fisheries,

migratory birds, and lands, air, or waters outside Canada or in provinces other than where a project is located, and (2) determine whether to impose restrictions on those projects and to safeguard against adverse effects in those areas, based on whether the adverse effects are significant, unless allowing those effects is in the public interest.

[224] The subject matter of the *IAA* is anchored in several federal heads of legislative power under the *Constitution Act, 1867* in relation to fisheries and aquatic species (s. 91(12)), migratory birds (s. 132), “Indians, and Lands reserved for the Indians” (s. 91(24)), and interprovincial and international pollution (s. 91). Particular instances of government action that may exceed statutory authority, federal jurisdiction, or both, can be challenged on judicial review in future cases with a well-developed evidentiary record, rather than through this reference. The fact that the *IAA* could conceivably be used unconstitutionally in *some* cases does not mean that the legislation is unconstitutional.

[225] We agree with Greckol J.A., dissenting in the Court of Appeal of Alberta, and with much of her analysis. In our opinion, the *IAA* and Regulations are *intra vires* Parliament.

II. Federalism and the Environment

[226] The common future of all Canadians — and humanity as a whole — depends on a healthy environment (*114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 1). Over

25 years ago, this Court recognized that environmental protection had become “a major challenge of our time” (*Hydro-Québec*, at para. 127). Since then, major environmental risks have only intensified. As this Court recently warned, the environmental harms caused by climate change pose “an existential challenge” and “a threat of the highest order to the country, and indeed to the world” (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (“*References re GGPPA*”), at para. 167). Today, “[t]he undisputed existence of a threat to the future of humanity cannot be ignored” (para. 167).

[227] The environment, by its very nature, is complex and diffuse (*Canadian Pacific*, at para. 43; *Oldman River*, at pp. 37 and 64; *Spraytech*, at para. 33; *Hydro-Québec*, at para. 86). This Court has recognized that the “environment” is not a subject matter assigned to either Parliament or the provinces under the *Constitution Act, 1867*, but instead “cuts across many different areas of constitutional responsibility, some federal, some provincial” (*Hydro-Québec*, at para. 112; *Oldman River*, at pp. 63-64; *Spraytech*, at para. 33). Environmental protection requires action by all levels of government because each — whether by action or inaction — can affect the environment (*Hydro-Québec*, at para. 127; *Oldman River*, at p. 65; *Canadian Pacific*, at paras. 59 and 84). This shared responsibility is “neither unusual nor unworkable” in a federal state such as Canada (*Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 193). Rather, it reflects this Court’s flexible approach to federalism, which recognizes that overlapping powers are unavoidable and

intergovernmental cooperation is essential (*Canadian Western Bank*, at para. 42; see also *References re GGPPA*, at para. 50).

[228] Because the Constitution is a framework for life and political action in Canada, this Court has directed that courts must approach constitutional interpretation in a way that allows governments to address complex and evolving issues and that “foster[s] co-operation among governments and legislatures for the common good” (*Canadian Western Bank*, at para. 22; see also para. 42). The “dominant tide” of modern constitutional interpretation finds expression in the idea “that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government” (para. 37 (emphasis in original)). Thus, “[i]n the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest” (para. 37; see also *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 63; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 17). This Court has repeatedly stressed that “overlap of legislation is to be expected and accommodated in a federal state” (*Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 26, quoting *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669). Cooperative federalism and the modern approach to constitutional interpretation must guide every step of the analysis in this reference.

[229] This modern approach to constitutional interpretation is reflected in the “presumption of constitutionality”. According to this presumption, “every legislative provision is presumed to be *intra vires* the level of government that enacted it” (*Murray-Hall*, at para. 79). The party challenging legislation that has “emerged from the democratic process” bears the onus of demonstrating that the enactment does not fall within the legislature’s jurisdiction (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 15:13; *Murray-Hall*, at para. 80; *Reference re Firearms Act*, at para. 25; P. Daly, “Constitutionally Conforming Interpretation in Canada”, in M. Klatt, ed., *Constitutionally Conforming Interpretation — Comparative Perspectives*, vol. 1, *National Reports* (forthcoming), at p. 8; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. IV.56). The presumption of constitutionality was helpfully explained by Beetz J. in *Canadian Broadcasting Corp.*:

Many statutes are drafted in terms so general that it is possible to give them a meaning which makes them *ultra vires*. It is then necessary to interpret them in light of the Constitution, because it must be assumed the legislator did not intend to exceed his authority:

There is a *presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.

(p. 641, quoting *Reference re The Farm Products Marketing Act*, at p. 255, per Fauteux J.)

[230] It bears emphasis that legislation is not unconstitutional simply because it could conceivably be misused. Rather, the *particular exercises of discretion* in such

cases would be unreasonable and properly subject to judicial review based on an appropriate evidentiary record. That approach flows from what Professor Daly calls the “presumption of constitutionally conforming administration” (p. 1). As he explains, “[w]here there is a constitutional challenge to a legislative regime which is administered by an administrative decision-maker, the courts will presume that the regime will be administered in a constitutionally compliant manner” (p. 7). Because any statute enacted by Parliament or a legislature that is inconsistent with the Constitution is *ultra vires* and invalid, “any body exercising statutory authority . . . is also bound” by the Constitution (Hogg and Wright, at § 37:8). The alternative — treating broad grants of statutory discretion as unconstitutional based on the text’s furthest reaches, without regard for constitutional or administrative law constraints — would render *ultra vires* many provincial and federal statutes currently in force.

[231] For present purposes, the presumption of constitutionality has two related legal consequences. First, as noted by Professors Hogg and Wright, “in choosing between competing, plausible characterizations of a law, the court should normally choose that one that would support the validity of the law” (§ 15:13; see also Daly, at p. 7; Brun, Tremblay and Brouillet, at para. IV.57; G.-A. Beaudoin, in collaboration with P. Thibault, *La constitution du Canada* (3rd ed. 2004), at p. 338). Second, “where a law is open to both a narrow and a wide interpretation, and under the wide interpretation the law’s application would extend beyond the powers of the enacting legislative body, the court should ‘read down’ the law so as to confine it to those applications that are within the power of the enacting legislative body” (Hogg and

Wright, at § 15:13; Daly, at p. 10; Brun, Tremblay and Brouillet, at paras. IV.47 and IV.57). The presumption of constitutionality operates as a principle of “[j]udicial restraint in determining the validity of statutes” that has “the effect of reducing interference by unelected judges with the affairs of the elected legislative branch of government” (Hogg and Wright, at § 15:13). The presumption “remains a cardinal principle of our division of powers jurisprudence” (*Murray-Hall*, at para. 79).

[232] In applying these principles of constitutional interpretation, courts have upheld the constitutionality of both federal and provincial environmental legislation (*Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.); *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Oldman River*; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028; *Hydro-Québec*; *Spraytech*; *References re GGPPA*). However, where Parliament or provincial legislatures have plainly overstepped their constitutional competence, legislation has been found unconstitutional (*Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; *Fowler v. The Queen*, [1980] 2 S.C.R. 213; *Reference re Environmental Management Act*, 2020 SCC 1, [2020] 1 S.C.R. 3). As we will explain, that cannot be said about Parliament in enacting the *IAA*.

[233] Although the principles of cooperative federalism inform all stages of the division of powers analysis, concerns for flexibility and cooperation cannot override the division of powers (*References re GGPPA*, at para. 50). Courts must recognize and

respect the constitutional bargain struck with respect to the exclusive catalogue of both federal and provincial powers. One such head of power is s. 92A, which was intended to “fortif[y]” a province’s exclusive legislative jurisdiction over non-renewable natural resources in the province by seeking “to respond to . . . insecurity about provincial jurisdiction over resources”, including by authorizing the provinces “for the first time, . . . to legislate for the export of resources to other provinces subject to Parliament’s paramount legislative power in the area” (*Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at pp. 376-77). As with other provincial heads of power, the constitutional bargain underlying s. 92A is one that this Court must recognize and respect.

[234] To sum up, the goals of flexibility and cooperation animate this Court’s federalism jurisprudence, including in the environmental context. Legislation must be approached from a posture of respect and presumed good faith on the part of legislatures, interpreted to comply with constitutional limits, and evaluated on the basis that the courts should favour the operation of statutes enacted by both levels of government whenever possible.

III. The Evolution of Federal Environmental Assessment Regimes

[235] Canada has had four federal environmental assessment regimes since 1984: (1) the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 (“Guidelines Order”); (2) the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA 1992”); (3) the *Canadian Environmental Assessment Act, 2012*, S.C.

2012, c. 19, s. 52 (“*CEAA 2012*”); and (4) since 2019, the *IAA*. Although these regimes have evolved considerably over the past 40 years, they have also maintained strong threads of continuity.

[236] In broad terms, all the federal environmental assessment regimes have shared three core elements.

[237] First, all the federal regimes have used a stage-based information-gathering and decision-making process. At the initial stage, federal authorities evaluate the project’s effects to determine whether further assessment is warranted (*Guidelines Order*, s. 10; *CEAA 1992*, ss. 18 and 21; *CEAA 2012*, s. 8; *IAA*, ss. 10 to 15). If it is, then the project’s effects are examined more closely and an assessment report is prepared (*Guidelines Order*, s. 12; *CEAA 1992*, s. 34; *CEAA 2012*, ss. 19 to 25; *IAA*, s. 28). Ultimately, federal authorities decide whether the project’s adverse effects should be allowed (*Guidelines Order*, s. 12; *CEAA 1992*, s. 37; *CEAA 2012*, s. 52(1); *IAA*, ss. 60 to 63).

[238] Second, all the federal regimes have considered a broad range of effects — including health, social, and economic effects — rather than just effects on the physical environment (*Guidelines Order*, s. 4; *CEAA 1992*, s. 2(1); *CEAA 2012*, ss. 4(1), 5(1) and 19(1); *IAA*, ss. 22 and 63). Parliament has long recognized the link between the environment, the economy, and health by identifying sustainable development as a key purpose of environmental assessment regimes (*CEAA 1992*, s. 4(b); *CEAA 2012*, s. 4(1)(h); *IAA*, s. 6(1)(a)).

[239] Third, to focus assessment efforts, all the federal regimes have used lists of projects considered likely to have significant environmental effects by providing that listed projects skip initial screening and go straight to assessment (Guidelines Order, s. 11(b)); that listed projects would undergo more intensive evaluation at the initial stage (*CEAA 1992*, s. 59(b); *Comprehensive Study List Regulations*, SOR/94-368); or that only listed projects would be subject to the federal regime (*CEAA 2012*, s. 84(a); *IAA*, s. 109(b)).

[240] Parliament has also changed the federal regimes over time, moving from a model in which projects were assessed only if they required federal involvement (such as a federal permit or federal funding) to a model in which projects were assessed only if they could have significant adverse effects in areas of federal authority. This change allowed Parliament to focus federal assessment efforts on a much smaller number of major projects.

[241] The Guidelines Order and the *CEAA 1992* applied to projects or proposals initiated by the federal government, those for which a federal authority had a decision-making function (such as a permit or licence requirement), and those that received federal funding (Guidelines Order, s. 6; *CEAA 1992*, s. 5(1)). Under those triggers, the *CEAA 1992* regime applied to roughly five to six thousand projects annually (Regulatory Impact Analysis Statement, SOR/2012-147, *Canada Gazette*, Part II, vol. 146, No. 15, July 18, 2012).

[242] By contrast, the *CEAA 1992* and *IAA* designated projects for assessment based on the likelihood that the project would cause effects in areas of federal authority. Under the *CEAA 2012*, Parliament eliminated federal initiation, funding, and decision-making functions as triggers for assessment (House of Commons, Standing Committee on Environment and Sustainable Development, *Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources* (2012), at pp. 9 and 13). Instead, Parliament decided that the federal assessment regime would apply only to projects designated by inclusion in the Regulations, commonly known as the “Project List”, or by the Minister, based on their potential to cause adverse effects in areas of federal authority, such as in relation to fish, aquatic species, migratory birds, or Indigenous peoples (*CEAA 2012*, ss. 4(1)(a) and 5(1)(a); *IAA* ss. 9(1) and 109(b)). This change significantly narrowed the scope of the federal environmental assessment regimes under both statutes. While the *CEAA 1992* applied to thousands of projects annually, the *CEAA 2012* regime applied to only about 70 projects (A. Johnston et al., *Is Canada’s Impact Assessment Act Working?*, May 2021 (online), at p. 32, note 4; Canadian Environmental Assessment Agency, *Departmental Results Report 2017-18* (2018), at p. 19). Similarly, only seven new projects entered the *IAA* regime during its first year (Impact Assessment Agency of Canada, *Departmental Results Report 2020-21* (2021), at p. 8).

IV. The Impact Assessment Act

[243] The *IAA* builds on earlier federal environmental assessment regimes by establishing a multi-stage process to assess the effects of designated projects and protect against adverse effects in specified areas, unless allowing them would be in the public interest. Under the “designated projects” scheme, the adverse federal effects act as a jurisdictional trigger and impact each stage of the *IAA* regime (as it did under the *CEAA 2012*). An impact assessment under the *IAA* moves from designation of a project, to the statutory prohibitions, to three main phases of an environmental impact assessment process: a planning phase, an impact assessment phase, and a decision-making phase based on public interest considerations.

A. *Designation of Projects on the Project List Based on Adverse Federal Effects*

[244] The main scheme of the *IAA* applies only to “designated projects”. A designated project is defined as one or more physical activities that are carried out in Canada or on federal lands and that are designated by regulations or by order of the Minister of the Environment, if the Minister is of the opinion that the physical activity “may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation” (s. 9(1)). Designated projects are listed under the Project List, described further below.

[245] The generic term “effects” and the two more specific terms “adverse effects within federal jurisdiction” and “direct or incidental effects” are each defined under the *IAA* and play an important role at each stage of the assessment process:

- “effects” is defined as meaning, “unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes” (s. 2);
- “direct or incidental effects” are defined, in essence, as “effects” that flow from the federal government exercising a power or providing financial assistance to allow a physical activity or designated project to proceed (s. 2);
- “effects within federal jurisdiction” are defined, substantially similarly as “environmental effects” in the *CEAA 2012*, with respect to a physical activity or a designated project as (a) a change to certain components of the environment within the legislative authority of Parliament, including fish and fish habitat, aquatic species, or migratory birds; (b) any change to the environment on federal lands, in another province, or outside Canada; (c) any change to the environment of Indigenous peoples that has an impact on physical and cultural heritage, use of lands for traditional purposes, or structures of significance; (d) any change to the health, social or economic conditions of Indigenous peoples; or (e) any change to a health, social or economic matter within the legislative authority of Parliament set out in Sch. 3 (as yet undefined) (s. 2).

[246] The Regulations, or Project List, contain a list of physical activities designated as projects to which the *IAA* applies. The objective of the Project List is “to identify those major projects with the greatest potential for adverse effects on areas of federal jurisdiction related to the environment, so that they can enter into the impact assessment process” (Regulatory Impact Analysis Statement, SOR/2019-285, *Canada Gazette*, Part II, vol. 153, No. 17, August 21, 2019, at p. 5661). It was developed “using the previous list under the CEAA 2012 as a starting point” (p. 5661). The Project List currently includes the following categories of physical activities based on listed criteria: “National Parks and Protected Areas”, “Defence”, “Mines and Metal Mills”, “Nuclear Facilities, Including Certain Storage and Long-term Management or Disposal Facilities”, “Oil, Gas and Other Fossil Fuels”, “Electrical Transmission Lines and Pipelines”, “Renewable Energy”, “Transport”, “Hazardous Waste”, and “Water Projects”.

B. *Prohibitions*

[247] Designation of a physical activity as a designated project under the *IAA* triggers a range of prohibitions, pausing activity that may cause federal effects while such effects can be assessed and decided on. Proponents of designated projects are prohibited from taking actions that would cause prohibited effects, defined in identical terms to “effects within federal jurisdiction” in s. 2 (s. 7). Federal authorities are also prohibited from acting under any other federal legislation to permit the designated project to proceed and from financially supporting the designated project (s. 8).

[248] A designated project then proceeds, as required, through the phases of the environmental impact assessment process under the *IAA*: (1) the planning phase, (2) the impact assessment phase, and (3) the decision-making phase (also known as the public interest determination). Each phase is described briefly below.

C. *The Planning Phase*

[249] All designated projects enter the planning phase. At this stage, the Impact Assessment Agency of Canada gathers information about the designated project from the proponent; provides the public with an opportunity to participate meaningfully in its preparations for a possible impact assessment of the project; offers to consult another jurisdiction that has powers, duties, or functions in relation to an assessment of the environmental effects of the designated project and any Indigenous group that may be affected by the carrying out of the designated project; and then decides whether an impact assessment is necessary (ss. 10 to 12 and 16). The Agency's decision must be based on several factors, including "the possibility that the carrying out of the designated project may cause adverse [federal] effects" or have an adverse impact on the rights of the Indigenous peoples of Canada under s. 35 of the *Constitution Act, 1982* (s. 16(2)). If the Agency determines that an impact assessment is unnecessary, the prohibitions terminate and the project exits the regime (s. 7(3)(a)). Otherwise, the project proceeds to the impact assessment phase.

D. *The Impact Assessment Phase*

[250] At the impact assessment phase, the Agency gathers more information about the designated project from the proponent, ensures public participation in the impact assessment process, and prepares an impact assessment report (ss. 19(1) and (2), 27 and 28). The report must set out what effects the Agency views as “likely to be caused by the carrying out of the designated project”, which of those effects are adverse federal effects, and the extent to which those likely adverse effects are significant (s. 28(3)). The report must consider a broad range of factors, including mitigation measures, the purpose and need for the designated project, alternative means of carrying out the project, and impacts of the project on any Indigenous group and any adverse impact the project may have on the rights of the Indigenous peoples of Canada under s. 35 of the *Constitution Act, 1982* (s. 22(1)).

E. *The Decision-Making Phase (the Public Interest Determination)*

[251] Finally, the Minister or Governor in Council decides whether allowing the likely and adverse federal effects of a designated project, as detailed in the report, is in the “public interest” and, if so, whether specific conditions should be imposed (ss. 60(1) and 62). The *IAA* lists the “public interest” factors that the relevant decision maker must consider: (1) the extent to which the adverse federal effects of the project are significant, the extent to which the project contributes to sustainability, and the extent to which the effects of the project “hinder or contribute” to Canada’s ability to meet its environmental obligations and climate change commitments; (2) impacts of the project on Indigenous groups or the rights of the Indigenous peoples of Canada

under s. 35 of the *Constitution Act, 1982*; and (3) whether mitigation measures may alleviate the adverse federal effects of the project (s. 63). The Minister must provide detailed reasons demonstrating that the determination was based on the impact assessment report and considered all the required public interest factors (s. 65(2)). Any conditions imposed on the project may relate only to a project's adverse federal effects (s. 64). A positive public interest determination means that all prohibitions terminate, provided that the proponent of the designated project complies with any conditions imposed (s. 7(3)(b)).

V. Analysis

[252] A court reviewing a law on federalism grounds proceeds in two steps: first, the court characterizes the challenged law by determining its “pith and substance” or dominant or most important characteristic; second, based on that characterization, the court classifies the law by assigning it to one or more of the heads of legislative power under the *Constitution Act, 1867* (*Murray-Hall*, at paras. 22-23; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 26; *References re GGPPA*, at para. 47; Hogg and Wright, at § 15:4).

A. *Characterization of the Impact Assessment Act Scheme*

[253] To characterize a challenged law, a court must determine its dominant or most important characteristic by considering the law's purpose and its practical and legal effects (*Murray-Hall*, at paras. 23-24; *References re GGPPA*, at para. 51;

Reference re Genetic Non-Discrimination Act, at paras. 28 and 30; Hogg and Wright, at § 15:5). The law's secondary objectives or incidental effects do not affect its constitutionality, even though they may be of significant practical importance (*Canadian Western Bank*, at para. 28; *PHS Community Services*, at para. 51; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23). The “‘pith and substance’ doctrine is founded on the recognition” that, in a federal state like Canada, with legislative jurisdiction divided between two levels of government, “it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government” (*Canadian Western Bank*, at para. 29).

[254] Characterizing or determining the pith and substance of a challenged law requires interpreting the law and should not be approached in a technical or formalistic manner (*Murray-Hall*, at para. 24, quoting *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18, and P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at pp. 15-12 and 15-13; *References re GGPPA*, at para. 51). Whether the law will achieve its intended purpose relates to the law's wisdom or efficacy and is a matter exclusively for the enacting legislature to consider (*Murray-Hall*, at para. 44; *Reference re Firearms Act*, at para. 18; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 90).

[255] As part of the characterization exercise, the law should be described as precisely as possible, without considering potential heads of power that might support the law, to avoid the characterization stage being overly influenced by the classification stage (*References re GGPPA*, at paras. 52 and 56; *Reference re Genetic Non-Discrimination Act*, at paras. 31-32).

[256] In what follows, we first address the purpose of the *IAA* based on intrinsic and extrinsic evidence, followed by the scheme's legal and practical effects.

[257] We disagree with the majority's conclusion that the pith and substance of the designated projects scheme of the *IAA* is "to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts" (para. 76; see also paras. 6, 109 and 204). In our view, the pith and substance of the designated projects scheme is, more specifically, to establish an environmental assessment process to (1) assess the effects of physical activities or major projects on federal lands, Indigenous peoples, fisheries, migratory birds, and lands, air, or waters outside Canada or in provinces other than where a project is located, and (2) determine whether to impose restrictions on the project to safeguard against significant adverse federal effects, unless allowing those effects is in the public interest. This description of the pith and substance is more precise and highlights the critical role of the public interest decision-making process under the legislation.

(1) Purpose

[258] To determine a law’s purpose, a court looks to intrinsic evidence, such as the law’s text, title, and structure, as well as any preamble and purpose clause, and extrinsic evidence, such as parliamentary debates, minutes of parliamentary committees, legislative history, and the events preceding the enactment of the law (*Murray-Hall*, at para. 25; *Reference re Genetic Non-Discrimination Act*, at para. 34; *References re GGPPA*, at para. 62).

[259] The intrinsic and extrinsic evidence shows that the purpose of the *IAA* is to establish a transparent information-gathering and decision-making process about whether physical activities or designated projects have adverse federal effects, and if so, whether they should be permitted in the public interest, with or without conditions.

(a) *Intrinsic Evidence*

[260] We agree with the majority that the intrinsic evidence suggests that the purpose of the *IAA* is to establish “an information-gathering process in the service of an ultimate decision-making function” (para. 81). We would add, however, that the information-gathering process and decision-making function are more specifically directed at whether the project under consideration has any adverse “effects within federal jurisdiction” as defined in s. 2 of the *IAA*, and, if so, whether those effects are nonetheless in the public interest.

[261] This more precise purpose of the *IAA* — to establish an information-gathering process and decision-making function as to whether designated projects have

adverse federal effects and if so, whether it is in the public interest to allow them to go forward — is reflected in several aspects of the intrinsic evidence. As the majority notes, the long title of the statute — *An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects* — highlights that the legislation establishes a federal process “designed to prevent those environmental effects that are both significant and adverse” and “would . . . seem to indicate a fairly tailored scheme” (para. 78). This purpose permeates the text and structure of the legislation. At every stage, the major decisions taken by federal authorities under the *IAA* are closely linked to adverse federal effects:

- The Minister may designate projects based on their potential to cause adverse federal effects (s. 9(1)).
- The Agency decides whether an assessment is required on the same basis (s. 16(2)), and must set out in the assessment report adverse federal effects likely to be caused by the carrying out of the designated project (s. 28(3)).
- Ultimately, in light of the report, the Minister or Governor in Council decides whether allowing the likely adverse federal effects is in the public interest based on the extent to which those effects are significant and whether they can be mitigated (ss. 60 to 63).

- Any conditions attached to a positive public interest determination may relate only to those likely, adverse federal effects (s. 64(1) and (2)).

[262] The *IAA*'s stated purposes and preamble confirm this view of its more precise purpose. Most importantly, the *IAA* is intended to protect "the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project" (s. 6(1)(b)).

[263] The majority notes that the *IAA*'s preamble also refers to Canada's commitments to "fostering sustainability" and to "fostering reconciliation" with the Indigenous peoples of Canada, and lists fifteen stated purposes in s. 6, which, in the majority's view, collectively "sweep far more broadly" (para. 79). However, these stated commitments in the preamble and purposes set out in s. 6 are all directed at how the information-gathering process and the public interest decision-making function are to be undertaken in service of the dominant protective purpose set out in s. 6(1)(b). For example, procedurally, the *IAA*'s stated purposes include promoting cooperation with Indigenous peoples (s. 6(1)(f)); completing assessments in a timely manner (s. 6(1)(i)); enabling meaningful public participation (s. 6(1)(h)); and establishing a "fair, predictable and efficient process" that "enhances Canada's competitiveness" (s. 6(1)(b.1)). As to public interest determinations, Parliament sought to be transparent by specifying that public interest decisions under the *IAA* must consider both positive and adverse effects of a project (s. 6(1)(c)), promote sustainability (s. 6(1)(a)), consider

alternative means (s. 6(1)(k)), and ensure respect for the rights of Indigenous peoples (s. 6(1)(g)). These detailed goals do not suggest that the *IAA*'s purpose is to regulate *all* aspects of the designated projects; instead, they must be read in light of the statutory scheme as a whole — they guide decision makers on how to assess when allowing likely adverse federal effects may be in the public interest, and thus to make an integrated decision that considers all the positive and negative effects of the designated project.

(b) *Extrinsic Evidence*

[264] Extrinsic evidence, such as the events preceding the *IAA*'s introduction in the House of Commons, confirm that the *IAA*'s dominant purpose is to allow well-informed, transparent decisions as to whether allowing a project's adverse federal effects is in the public interest.

[265] The Expert Panel for the Review of Environmental Assessment Processes, established in 2016 to review the *CEAA 2012* regime and recommend reforms, recognized the central role of federal jurisdiction and the importance of transparent federal decision-making. The Expert Panel's report noted that "it should be clear when a federal [impact assessment] will be required", and thus recommended that "careful consideration and incorporation of federal jurisdiction [be] the starting point from which to answer the question of when federal [impact assessment] should apply" (*Building Common Ground: A New Vision for Impact Assessment in Canada* (2017), at pp. 17-18). The Expert Panel's report also endorsed a holistic sustainability inquiry

at the public interest determination stage, and highlighted that federal jurisdiction was essential and that effects within federal jurisdiction must be “consequential” (p. 21).

[266] In response to the Expert Panel’s report, the federal government issued a discussion paper outlining its contemplated reforms. The discussion paper confirmed that adverse federal effects would be central to a transparent assessment process. The federal government would: (1) review the Project List “to ensure those types of major projects that have the greatest potential impacts in areas of federal jurisdiction are assessed”; and (2) provide clear criteria and more transparency around the ministerial designation, without changing the fact that the Minister can only designate projects that could have adverse effects on areas of federal jurisdiction (Natural Resources Canada, *Environmental and Regulatory Reviews: Discussion Paper* (2017), at p. 18).

(c) *Conclusion on the Purpose of the IAA*

[267] The intrinsic and extrinsic evidence confirms that the IAA’s purpose is to establish a transparent information-gathering and decision-making environmental assessment process which is focused on whether physical activities or designated projects have adverse federal effects, and if so, whether they should be permitted in the public interest, subject to any conditions.

(2) Legal Effects

[268] The legal effects of a law relate to “how the legislation as a whole affects the rights and liabilities of those subject to its terms” (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 482; see also *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 54; *Murray-Hall*, at para. 25).

[269] To identify the IAA’s legal effects, the key parts of the IAA must be interpreted based on ordinary rules of interpretation, including the modern approach to statutory interpretation, which examines the text, context, and purpose of legislation; the presumption against absurdity; and the presumption of constitutionality. A proper statutory interpretation shows that the main legal effects of the IAA are that: (1) projects are designated based on the likelihood they would cause non-trivial adverse federal effects; (2) the Agency decides whether to assess projects on the same basis; (3) the Agency’s report must identify the adverse federal effects that a project is likely to cause and specify the extent to which those effects are significant; and (4) the ultimate public interest determination and any resulting conditions imposed on the project must be *reasonable and proportionate*, based on the adverse federal effects, the extent to which they are significant, and whether they can be mitigated. In what follows, we address the interpretive issues at each stage of the IAA regime that result in these four main legal effects.

(a) “*Effects Within Federal Jurisdiction*” Does Not Encompass Trivial Effects

[270] The proper interpretation and scope of the defined term “effects within federal jurisdiction” determines the legal effects of the *IAA* at every stage — from designation (s. 9(1)), to the scope of prohibitions (s. 7), to whether an assessment is required (s. 16), to what effects the assessment report must identify (ss. 28(3) and 51(1)(d)), to the basis for the decision as to the public interest (ss. 60(1) and 62) and any conditions that may be imposed (s. 64(1)).

[271] In the decision under appeal, the majority of the Alberta Court of Appeal interpreted the *IAA* as including “no materiality threshold” and asserted that “there is *no requirement* that any purported adverse federal effects actually *be significant*” (2022 ABCA 165, 470 D.L.R. (4th) 1, at paras. 239-40 (emphasis in original); see also para. 302). It thus claimed that the *IAA* allows “the federal executive to stop any intra-provincial designated project whenever there are *any* adverse federal effects of that project on the components of the environment” (para. 241 (emphasis in original)). The majority of our Court seems to share this view, stating that “effects within federal jurisdiction” applies to “positive and adverse changes of any magnitude”, and concluding that “projects with little or no potential for adverse federal effects will nonetheless be required to undergo an impact assessment” (paras. 95 and 154 (emphasis added); see also paras. 138, 151-53, 180, 198 and 200). We disagree.

[272] The term “effects within federal jurisdiction”, when properly interpreted, does not encompass *de minimis*, trivial, or insignificant effects. Although “effects within federal jurisdiction” is defined as “a change” to listed “components of the

environment that are within the legislative authority of Parliament”, in light of the context and purpose of the *IAA*, the “change” contemplated cannot be an insignificant change that has no potential to make a difference to the environment (s. 2 “effects within federal jurisdiction” (a)). The whole scheme of the *IAA* is concerned with identifying and protecting against *significant* adverse environmental effects in areas of federal jurisdiction.

[273] Starting with the text, the *Oxford English Dictionary* defines a “change” as “an alteration in the state or quality of something; a modification” (online). The word “change” in relation to the environment necessarily connotes a materiality threshold, contrary to the conclusion of the majority of the Alberta Court of Appeal: if the designated project does not cause an alteration in the state or quality of the environment, there would be no “change”. A *de minimis*, trivial, or insignificant “change” would be no real change to the environment.

[274] The context and purpose of the *IAA* as environmental protection legislation confirms that “effects within federal jurisdiction” does not encompass *de minimis*, trivial, or insignificant effects. The long title of the *IAA* speaks of a federal assessment process for “significant adverse environmental effects”. The Expert Panel recognized that “consequential” effects were necessary to ground federal jurisdiction (p. 21). The Minister of the Environment and Climate Change testified that the *IAA*’s goal was to assess the projects with the “most potential” to have a “significant impact” on areas of federal jurisdiction (House of Commons, Standing Committee on Environment and

Sustainable Development, *Evidence*, No. 99, 1st Sess., 42nd Parl., March 22, 2018, at p. 18). And a key purpose of the *IAA* and *CEAA 2012* — in contrast to the Guidelines Order and *CEAA 1992* — was to focus assessment efforts on major projects most likely to have significant adverse effects in areas of federal authority.

[275] Indeed, the significance threshold for adverse environmental effects permeates every major stage and decision taken under the *IAA* with respect to designated projects. Under s. 28(3), the Agency must report on adverse federal effects and “specify the extent to which those effects are significant”; under ss. 31(1) and 33(2), the Minister may permit substitution of another jurisdiction’s assessment if satisfied that the other jurisdiction’s report would identify the adverse federal effects and “specify the extent to which those effects are significant”; under s. 51(1)(d)(ii), a joint federal-provincial review panel must prepare a report identifying the adverse federal effects and specify “the extent to which those effects are significant”; under s. 59(1) and (2), when the Agency terminates the assessment by a review panel, it must prepare a report identifying the adverse federal effects and “specify the extent to which those effects are significant”; under s. 60(1), the Minister’s decision-making is based in part on whether there are adverse federal effects and “the extent to which those effects are significant”; under s. 61(1), the Minister refers a designated project to the Governor in Council to determine whether there are adverse federal effects and “the extent to which those effects are significant”; under s. 62, the Governor in Council’s determination is based in part on whether there are adverse federal effects and “the extent to which those effects are significant”; and under s. 63(b), the Minister’s public

interest decision is based in part on whether there are adverse federal effects identified in the Agency's report and the extent to which those effects "are significant".

[276] In addition, these provisions of the *IAA* consistently recognize that the "significance" of adverse federal effects fall along a spectrum, and may be more or less significant. Throughout the *IAA*, federal authorities must review, specify, evaluate, and decide based on "the extent" to which the adverse federal effects are "significant". This statutory language recognizes that not all adverse federal effects are the same. Some may be more significant than others. Under the *IAA*, adverse federal effects are legally relevant for decision making based on *the extent to which they are significant*.

[277] It would thus undermine the *IAA*'s purpose and scheme for trivial or insignificant effects to be a basis for allowing projects to enter the *IAA* regime, for the Agency to determine whether an assessment is required, or for the ultimate public interest decision-making and any conditions imposed.

[278] The breadth of the definition of "effects within federal jurisdiction" must also be viewed in the specific context of environmental protection legislation — in this case, the *IAA* — and by considering related principles of statutory interpretation. This Court addressed the relevant interpretative principles in *Canadian Pacific* in rejecting the argument that s. 13(1)(a) of Ontario's *Environmental Protection Act*, R.S.O. 1980, c. 141, which imposed a broad and general prohibition of the pollution "of the natural environment for any use that can be made of it", was unconstitutionally vague. Justice Gonthier, for the majority, stated that, "[i]n the context of environmental protection

legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime”, and noted the recommendation of the Ontario Law Reform Commission that “generally framed pollution prohibitions are desirable from a public policy perspective” (para. 52). General language in environmental protection legislation, he stated, “ensures flexibility in the law” to “respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment” (para. 52). In addition, Gonthier J. affirmed that the phrase “use” relating to the natural environment was to be interpreted more narrowly in accordance with both the presumption against absurdity, to ensure that the prohibition was applied reasonably and not in cases of “trivial or minimal violations”, and the related principle of *de minimis non curat lex* (the law does not concern itself with trifles) (para. 65). In short, the prohibition was interpreted reasonably, in accordance with its environmental context, and in a way to avoid “unjust or inequitable results” (para. 65).

[279] Justice Gonthier’s caution in *Canadian Pacific* is especially apt when considering the broad protective language Parliament used in the *IAA*’s definition of “effects within federal jurisdiction”. Parliament used broad language in this definition because the *IAA* is environmental protection legislation with the important purpose of protecting the public through a comprehensive and flexible regime. However, this broad language must be interpreted to avoid a designated project entering the federal assessment regime based on trivial or insignificant environmental effects.

[280] In sum, the statutory text, context and purpose, along with the applicable interpretive principles, show that Parliament did not intend to capture *de minimis* effects. Moreover, even if interpreting the *IAA* to capture *de minimis* effects were a reasonably available interpretation, the presumption of constitutionality demands that it be rejected in favour of our constitutionally conforming interpretation.

(b) *Designation*

[281] The legal effect of designation under the *IAA*, whether by the Minister (s. 9(1)) or in regulations made by the Governor in Council (s. 109(b)), is to require projects to be subject to the *IAA* scheme because of the possibility they will have non-trivial, adverse federal effects. Designation also has the legal effect of triggering the prohibitions under the *IAA*.

[282] The Minister may designate a project “if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation” (s. 9(1)). The word “or” before “public concerns” does not mean that the Minister may designate a project based on public concerns alone, when the Minister believes the project would *not* cause adverse federal effects. At a minimum, for s. 9(1) to apply, the Minister must be of the opinion that the physical activity may cause adverse federal effects; if that threshold is met, public concerns related to “those effects” may be a relevant consideration in deciding whether to designate a project.

[283] The Governor in Council’s power to make regulations designating classes of projects is similarly constrained by the *IAA*’s purpose of protecting against significant (and therefore non-trivial) adverse federal effects. A regulation and the exercise of a discretionary regulation-making power must be consistent with the object and purpose of the enabling statute (*Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24; *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635, at para. 12; *References re GGPPA*, at para. 73). We therefore agree with Canada’s submission that the Governor in Council may only designate classes of projects they view as likely to cause significant adverse federal effects on a scale that justifies the process (A.F., at paras. 89-90). This conclusion is also consistent with the Regulatory Impact Analysis Statement accompanying the Regulations, which states that the “objective of the Project List is to capture those major projects with the greatest potential for adverse effects in areas of federal jurisdiction related to the environment, so that they can enter into the impact assessment process” (p. 5663). Lastly, this interpretation is confirmed by the presumption of constitutional conformity: designation of projects under the *IAA* with an expectation that they may have adverse federal effects suggests that federal discretionary authority is being exercised with a proper basis rooted in federal legislative jurisdiction under the *Constitution Act, 1867*.

(c) *Prohibitions*

[284] The legal effect of the *IAA*'s prohibitions is to require the proponent to not take any action in relation to the designated project that may cause non-trivial or potentially significant federal effects until either the Agency determines assessment is not required or a positive public interest determination is made. Designation triggers the prohibitions under s. 7: A proponent "must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause" any of several listed changes to components of the environment within the legislative authority of Parliament.

[285] Two legal effects of the prohibitions under s. 7 are noteworthy.

[286] First, the prohibitions under s. 7 apply when the effects "may cause" environmental changes, and do not require that the effects be proven to be "adverse" at this stage. This reflects the precautionary approach to environmental regulation. Under the precautionary principle, "[e]nvironmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation" (*Spraytech*, at para. 31, quoting *Bergen Ministerial Declaration on Sustainable Development* (1990), at para. 7). The *IAA* makes clear that the legislation must be administered by federal authorities by applying "the precautionary principle" (s. 6(2); see also s. 6(1)(d) and (l)). In recognition of the precautionary principle, environmental regimes such as

the *IAA* often require a pause while information about the potential impacts of a project is gathered and evaluated.

[287] Second, the prohibitions do not extend to *all* activities in relation to designated projects; they extend only to those that “may cause” non-trivial federal effects (s. 7).

(d) *The Planning Phase*

[288] The legal effects of the planning phase of the *IAA* are for the Agency to enable public participation, offer to consult other jurisdictions, and decide whether an assessment of the designated project is necessary, given the factors in s. 16, including the possibility that carrying out the designated project may cause adverse federal effects (ss. 10 to 16). If a project will not potentially cause any adverse federal effects — or if the Agency otherwise decides that no assessment is required — all the prohibitions under s. 7 terminate and the project exits the *IAA* regime (s. 7(3)(a)). Otherwise, the Agency must provide a notice of commencement and the project proceeds to assessment (s. 18(1)).

(e) *The Impact Assessment Phase*

[289] At the impact assessment phase, the *IAA*'s legal effects are to require the proponent to provide the information requested in the notice of commencement; the Agency to enable public participation and consult other jurisdictions; and the Agency

to prepare an assessment report setting out what non-trivial adverse federal effects the project is likely to cause and the extent to which they are significant (ss. 22 and 24 to 28).

(f) *The Decision-Making Phase (the Public Interest Determination)*

[290] After the impact assessment phase, the designated project moves to the decision-making phase. At this stage, the Minister or Governor in Council (on referral from the Minister) must determine whether allowing the likely and adverse federal effects set out in the Agency's report is in the public interest, given the extent to which they are significant and considering the public interest factors in s. 63 (ss. 60 to 63). As we explain below, the legal effect of the IAA's public interest decision-making phase is to require federal decision makers to reach *a reasonable and proportionate decision* on whether allowing the adverse federal effects specified in the Agency's report as likely to occur — in light of the extent to which they are significant and how they can be mitigated — is in the public interest. Its other legal effects are to: (1) provide transparency and constrain the basis of the public interest decision; and (2) require that conditions attached to a positive public interest decision apply only to the likely adverse federal effects specified in the Agency's report.

[291] Section 60 provides for the Minister's obligation to make a decision regarding the project or refer it to the Governor in Council. It reads in part:

60 (1) After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must

(a) determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest; or

(b) refer to the Governor in Council the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.

[292] Section 63 details the public interest factors the Minister must consider:

63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project . . . must be based on the report with respect to the impact assessment and a consideration of the following factors:

(a) the extent to which the designated project contributes to sustainability;

(b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;

(c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;

(d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and

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

[293] These provisions require the decision maker to consider the extent to which a project's federal effects are significant and whether and how they can be mitigated. The Minister or Governor in Council must make the public interest decision in light of the "extent to which the adverse effects within federal jurisdiction . . . are significant" (s. 63(b); see also ss. 60(1) and 62). Further, they must consider potential mitigation measures — which, particularly for projects with less significant adverse federal effects, may substantially alleviate those effects (s. 63(c); see also s. 64(1) and (2)). Although the decision makers must also consider other factors set out in s. 63 to determine whether the project is in the public interest, those factors are in aid of the ultimate determination required by s. 60(1)(a): ". . . whether the adverse effects within federal jurisdiction . . . [are] in the public interest . . ." *Likely adverse federal effects, standing alone, cannot be in the public interest.* To be in the public interest, adverse federal effects must be outweighed on the other side of the ledger by public interest factors in s. 63, which include both negative and positive effects.

[294] As a result, the decision-making phase in ss. 60 and 63 requires a cost-benefit analysis based on identified public interest considerations. In this sense, it is an integrated decision. Although the public interest factors in s. 63 (both positive and negative) may outweigh the adverse effects within federal jurisdiction, any public interest decision must be *reasonable and proportionate* to the adverse federal effects and potential mitigation measures. Any federal decision that sought to permit negligible federal effects to stop a project, in the face of substantial public interest factors, would be disproportionate, unreasonable, and subject to judicial review (*Canada (Minister of*

Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653). The public interest factors in s. 63 thus promote political accountability, the rule of law, and meaningful judicial review.

(3) Practical Effects

[295] The practical or “side” effects of legislation consist of “the actual or predicted results of the legislation’s operation and administration” for those subject to it (*Morgentaler*, at p. 486; *References re GGPPA*, at para. 51). Practical effects are relevant only if they shed light on the law’s pith and substance (*Canadian Western Bank*, at para. 26; *References re GGPPA*, at para. 51). Sometimes the evidence of practical effects may not be helpful in characterizing a challenged law (*References re GGPPA*, at para. 78).

[296] In *Morgentaler*, Sopinka J. sounded an important note of caution on the limited relevance of practical effects in determining whether legislation is *ultra vires* and the need to distinguish between true practical effects, which are relevant in some cases, from concerns presented as practical effects that really relate to the wisdom or efficacy of the legislation, which are never relevant. Justice Sopinka noted that while “the legal effect of the terms of legislation is always relevant, . . . [t]he practical effect of legislation, on the other hand, has a less secure status in constitutional analysis” (pp. 485-86). He noted that in most cases evidence of practical effects will only be relevant to demonstrate whether there is a colourable or *ultra vires* purpose (pp. 486-87). He added that, in many cases, the evidence of practical effect “would not add

anything useful to the task of characterization, but would merely bear on the wisdom or efficacy of the statute” (pp. 487-88, quoting P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 15-16). It is not the role of the courts to question the wisdom of a statute, its efficacy, or whether it achieves the legislature’s goals (*Ward*, at paras. 18 and 22).

[297] In the present reference, the majority of the Court claims that the *IAA* has two practical effects relevant to the legislation’s pith and substance: first, “the scheme results in delays of indeterminate duration”, while the regulatory process evaluates whether a project would have a significant adverse environmental effect; and second, “the impact assessment process requires the Agency, the project proponent, federal authorities and other implicated jurisdictions to expend resources” (paras. 106-7). In our view, both these inevitable consequences of applying the legislation are irrelevant in determining the pith and substance or constitutionality of the *IAA*. In the modern regulatory state, federal and provincial legislation often result in delay as regulatory agencies evaluate for compliance with statutory norms enacted to protect the public. Those statutes almost invariably result in the expenditure of resources — and often substantial resources. Legislation regulating toxic substances, food standards, product safety, and medicines come to mind, to name a few. But the delay and costs involved in complying with these and many other statutes that protect the public do not affect their constitutionality under the *Constitution Act, 1867*. Such concerns relate to the efficacy or wisdom of the legislation. They may be important policy matters for Parliament, but they are irrelevant for constitutional purposes.

(4) Conclusion on Pith and Substance

[298] In our view, the proper characterization of the pith and substance of the primary designated projects scheme of the *IAA* is to establish an environmental assessment process to (1) assess the effects of physical activities or major projects on federal lands, Indigenous peoples, fisheries, migratory birds, and lands, air, or waters outside Canada or in provinces other than where a project is located, and (2) determine whether to impose restrictions on the project to safeguard against significant adverse federal effects, unless allowing those effects is in the public interest.

[299] We turn next to the classification of the *IAA* and Regulations.

B. *Classification of the IAA Scheme*

[300] To classify a challenged law, the court must determine whether the law's pith and substance falls within one or more heads of power assigned to the enacting legislature under s. 91 or 92 of the *Constitution Act, 1867* (*Murray-Hall*, at para. 23; *References re GGPPA*, at paras. 47 and 114; *Reference re Firearms Act*, at para. 25; *Oldman River*, at p. 62). This often requires the court to interpret the relevant head or heads of power invoked to support the law (*Reference re Securities Act*, at para. 65). If the law can be supported under one or more heads of power assigned to the enacting legislature, the law is *intra vires* and valid (*Murray-Hall*, at para. 65; *Reference re Securities Act*, at para. 65; *Hydro-Québec*, at para. 112).

[301] A court classifying environmental legislation must remember that the environment is not a subject matter assigned to either level of government under the *Constitution Act, 1867* (*Oldman River*, at p. 63; *Hydro-Québec*, at para. 112). The environment is “a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial” (*Hydro-Québec*, at para. 112; see also *Oldman River*, at pp. 63-64). Both levels of government can therefore enact environmental protection legislation within their spheres and “may affect the environment, either by acting or not acting” (*Oldman River*, at p. 65). Under the double aspect doctrine, “Canada and the provinces are both free to legislate in relation to the same fact situation” (*References re GGPPA*, at para. 129; see also para. 130). The province may legislate regarding the provincial aspects of a project, while Parliament may legislate regarding the federal aspects (*Oldman River*, at p. 69). Although local projects within a province “will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction” (p. 69). The coexistence of such shared environmental responsibility over a project is “neither unusual nor unworkable” in a federal state like Canada (*National Energy Board*, at p. 193; see also *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 36).

[302] Consistent with these principles of flexible and cooperative federalism, both orders of government have constitutional authority to enact environmental legislation. Thus, Parliament is competent to enact federal environmental legislation under the federal powers over fisheries (*Northwest Falling Contractors; Oldman*

River), navigable waters (*Oldman River*), Indians and lands reserved for Indians (*Oldman River*), criminal law (*Hydro-Québec*), international and interprovincial rivers (*Interprovincial Co-operatives*), and the national concern branch of the peace, order, and good government power (*Crown Zellerbach; References re GGPPA*). There is also no doubt about the authority of the provinces to enact environmental legislation under a host of provincial legislative powers, including the powers over property and civil rights in the province, local works and undertakings, municipal institutions, and matters of a local or private nature, to name but a few (*Spraytech*, at para. 43; see, generally, Hogg and Wright, at §§ 30:31 to 30:33; Beaudoin, ch. 20; A. Johnston, “Federal Jurisdiction and the *Impact Assessment Act*: Trojan Horse or Rational Ecological Accounting?”, in M. Doelle and A. J. Sinclair, eds., *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act* (2021), 97, at pp. 98-103; M. Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (2008), at pp. 52-61; J. Leclair, “L’étendue du pouvoir constitutionnel des provinces et de l’État central en matière d’évaluation des incidences environnementales au Canada” (1995), 21 *Queen’s L.J.* 37, at p. 45; C. Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (2019), at pp. 103-6).

[303] Lastly, a court classifying environmental legislation must remember that “[e]nvironmental protection is a legitimate concern of government”, one that involves “a very broad subject matter which does not lend itself to precise codification” (*Canadian Pacific*, at para. 84). As a result, “[w]here the legislature is pursuing the

objective of environmental protection, it is justified in choosing equally broad legislative language in order to provide for a necessary degree of flexibility” (para. 84).

[304] In what follows, we apply these principles in classifying the *IAA* scheme. As we will explain, we conclude that the designated projects regulatory scheme is *intra vires* Parliament. Each of the adverse federal effects set out in the *IAA* anchor federal review and decision making under the *IAA* legislative scheme and fit within multiple heads of Parliament’s legislative jurisdiction under the *Constitution Act, 1867*. The majority of this Court concludes otherwise for two main reasons. First, the majority asserts that the adverse federal effects for designated projects “do not drive the scheme’s decision-making functions”, and thus “the scheme is not in pith and substance directed at regulating these effects” (para. 135). Second, the majority claims that the adverse federal effects are overbroad and do not “alig[n] with federal legislative jurisdiction under s. 91”, which “exacerbates the constitutional frailties of the scheme’s decision-making functions” (para. 136). We address both objections below. We also briefly explain why there is no merit to Alberta’s alternative argument that even if the *IAA* scheme is constitutionally valid, it is constitutionally inapplicable to provincial projects under the doctrine of interjurisdictional immunity.

(1) Adverse Federal Effects Anchor Federal Review and Decision Making Under the *IAA*

[305] The majority correctly identifies “four decision-making junctures” under the *IAA*: (a) designating physical activities as “designated projects”; (b) the screening

decision as to whether a project should proceed to an impact assessment; (c) identifying the scope of the assessment and the factors to be considered; and (d) the public interest decision and resulting regulation and oversight (para. 137). The majority concludes that the first and third junctures are constitutional, but views the second and fourth junctures as unconstitutional because adverse federal effects do not drive the scheme's decision-making functions (paras. 147, 154, 161 and 178). We disagree. All four decision-making junctures are constitutional because the adverse federal effects anchor the federal review and decision making at each stage of the *IAA*.

(a) *Designation of Physical Activities as “Designated Projects”*

[306] The designation process under the *IAA* is constitutional because it is driven by the *potential* for a physical activity to cause adverse federal effects. Physical activities can be designated as designated projects by the Minister or by regulation. The ministerial designation under s. 9(1) is based on the Minister's opinion that the carrying out of the physical activity “may cause” adverse federal effects that warrant the designation, while the designation by regulation under s. 109(b) must be consistent with the object and purpose of the *IAA* to protect against significant adverse federal effects and “to identify those major projects with the greatest potential for adverse effects on areas of federal jurisdiction . . . , so that they can enter into the impact assessment process” (Regulatory Impact Analysis Statement (2019), at p. 5661). These provisions — together with the Agency's decision on whether to order an impact assessment based in part on “the possibility that the carrying out of the designated

project may cause” adverse federal effects and “any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*” — reflect the precautionary principle (s. 16(2)(b) and (c)). As noted by Anna Johnston, “the [IAA] does not require proof of federal effects to order an assessment — only the possibility of effects” (p. 105).

[307] Information must first be gathered before federal decision makers can decide on a project. Environmental impact assessment is a “planning tool” with “an information-gathering and a decision-making component” that provides federal decision makers with “an objective basis for granting or denying approval for a proposed development” (*Oldman River*, at p. 71). As a planning tool, an environmental assessment has a “low jurisdictional ‘threshold’” because it “occurs in the early stages of decision making, before information about potential impacts on areas of federal jurisdiction may be known” (Johnston, at pp. 104-5). Indeed, “[r]equiring federal authorities to obtain evidence of a project’s effects prior to the assessment would be to put the cart before the horse and undermine the [IAA]’s objectives of precaution and protection of the environment” (p. 105). As a result, “the decision to carry out an [environmental assessment] has to be made in the face of uncertainty and information gaps”, which are to be filled through the assessment process (J. MacLean, M. Doelle and C. Tollefson, “Polyjural and Polycentric Sustainability Assessment: A Once-in-a-Generation Law Reform Opportunity” (2016), 30 *J.E.L.P.* 35, at p. 43).

[308] In our view, the designation process under the *IAA* appropriately reflects the precautionary principle and the need to gather information at an early stage of an environmental impact assessment process, to properly inform federal decision making about whether a designated project may cause adverse federal effects. The potential to cause adverse federal effects anchors this first stage of the process, and is therefore *intra vires* Parliament.

[309] Although the majority accepts that the designation mechanism under the *IAA* is “constitutionally sound”, it does not accept that the Agency’s decision to order an assessment under s. 16(1) of the *IAA* — which the majority calls “the screening decision” — is constitutional (paras. 146 and 154). We address that issue next.

(b) *The Screening Decision*

[310] As discussed, once a project is designated under the Regulations or by ministerial order, the Agency decides whether to conduct an impact assessment of the designated project based on mandatory factors in s. 16(2) of the *IAA*. Section 16 provides:

16 (1) After posting a copy of the notice on the Internet site under subsection 15(3), the Agency must decide whether an impact assessment of the designated project is required.

(2) In making its decision, the Agency must take into account the following factors:

(a) the description referred to in section 10 and any notice referred to in section 15;

(b) the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects;

(c) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(d) any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12;

(e) any relevant assessment referred to in section 92, 93 or 95;

(f) any study that is conducted or plan that is prepared by a jurisdiction — in respect of a region that is related to the designated project — and that has been provided to the Agency; and

(g) any other factor that the Agency considers relevant.

(3) The Agency must post a notice of its decision and the reasons for it on the Internet site.

[311] The potential that the designated project will cause adverse federal effects again anchors the Agency's discretionary screening decision under s. 16 of the IAA:

- Under s. 16(2)(a), the project description provided by the project proponent and the notice that the proponent must provide to the Agency must set out information that includes the project's potential adverse federal effects and the way the proponent is considering to mitigate them (ss. 10 and 15; *Information and Management of Time Limits Regulations*, SOR/2019-283, ss. 3 and 4, Sch. 1, ss. 19 to 24, and Sch. 2, ss. 19 to 24).

- Under s. 16(2)(b), the Agency must consider the possibility that the carrying out of the designated project may cause adverse federal effects.
- Under s. 16(2)(c), the Agency must consider “any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*”. Again, this is a potential adverse federal effect.
- Under s. 16(2)(d), the Agency must consider comments from the public and any jurisdiction or Indigenous group consulted. These comments could include comments on adverse federal effects, on adverse non-federal effects, or any other comments.
- Under s. 16(2)(e), the Agency must consider an assessment conducted in respect of physical activities entirely or in part on federal lands, or in respect of any Government of Canada policy, plan, or program, or any issue relevant in conducting an impact assessment of designated projects or a class of designated projects (ss. 92, 93 and 95).
- Under s. 16(2)(f), the Agency must consider any study conducted or plan prepared by another jurisdiction related to the designated project.

- Under s. 16(2)(g), the Agency may consider any other factor it considers relevant.

[312] The majority concludes that the Agency's broad discretion under s. 16 is unconstitutional because the decision to require an assessment is not "rooted in the possibility of adverse federal effects" (para. 150). The majority interprets the screening decision as "not driven by possible federal effects and therefore fails to focus the scheme on the federal aspects of designated projects" (para. 150). The majority concludes this because s. 16(2) contains "an open-ended list of factors, all of seemingly equal importance", but that only s. 16(2)(b) relates to adverse federal effects (para. 151). The majority says that the text of s. 16(2) "gives no primacy to the possibility of adverse effects relative to the other mandatory considerations" (para. 152). Finally, the majority concludes that, as worded, s. 16 poses a risk that "projects with little or no potential for adverse federal effects will nonetheless be required to undergo an impact assessment on the basis of less relevant, yet mandatory, considerations" (para. 154).

[313] We disagree with the majority's interpretation of s. 16. Each of the discretionary factors in s. 16(2)(a), (b) and (c) is rooted in adverse federal effects, not just s. 16(2)(b). And s. 16(2)(d) may also reflect adverse federal effects, depending on the comments of the public or the Indigenous group consulted (although it is impossible to anticipate such comments in advance, this hardly poses a constitutional problem). Section 16(2)(e) is largely irrelevant for most provincially regulated projects, unless

they occur on federal lands or relate to a federal government policy, program, or plan, in which case there is a clear nexus to federal jurisdiction. Section 16(2)(f) applies only where another jurisdiction conducts an assessment, in which case it is appropriate for the Agency to consider what the other jurisdiction has to say. Finally, s. 16(2)(g) is a residuary clause that allows the Agency to consider other factors it considers appropriate, but, like any discretionary power granted under legislation, it must be exercised reasonably and consistent with the object and purpose of the *IAA*, which, here, is to prevent significant adverse environmental effects. As a result, we see no constitutional objection to the criteria in s. 16. The Agency's discretionary screening decision is anchored in the possibility that the designated project will cause adverse federal effects.

[314] The principles of cooperative federalism also require a court, in evaluating the constitutionality of the legislation as a whole, to favour, where possible, the ordinary operation of statutes enacted by both levels of government and to avoid blocking the application of measures enacted to promote the public interest, while the presumption of constitutionality requires a court to interpret the discretion granted under the legislation as being exercised in good faith and within constitutional bounds (*Canadian Western Bank*, at para. 37; *Canadian Broadcasting Corp.*, at p. 641; Hogg and Wright, at § 15:13). Fidelity to these foundational constitutional precepts confirms the constitutionality of the discretion granted under s. 16.

[315] Finally, if the Agency were to exercise its discretion to require a project with little or no potential for adverse federal impacts to proceed to an impact assessment, such a decision would be unreasonable and would not reflect the object and purpose of the *IAA* to prevent significant adverse federal environmental effects. Such a decision in a particular case, and based on an appropriate evidentiary record, would be subject to judicial review. We cannot comment on such hypothetical scenarios involving alleged future improper exercises of discretion. As noted in the *References re GGPPA*, “[i]t is not this Court’s role to express opinions about the substance, arguments or merits of future challenges” (para. 220).

(c) *The Impact Assessment Phase*

[316] The Agency’s impact assessment of a designated project must take account of the broad range of factors in s. 22(1) of the *IAA*. Some of the listed factors are effects that fall within federal jurisdiction while others are intended to allow federal authorities to make a fully informed decision about the costs and benefits of proceeding with the project, with or without conditions, and about potential mitigation measures. The factors under s. 22(1) include:

- positive and negative environmental, health, social, and economic consequences of carrying out the designated project, the extent to which the project contributes to environmental sustainability, and any change to the project that may be caused by the environment (s. 22(1)(a), (h) and (j));

- mitigation measures that are technically and economically feasible (s. 22(1)(b));
- the potential impact of the designated project on any Indigenous group or the s. 35 rights of Indigenous peoples, Indigenous knowledge provided with respect to the project, Indigenous culture considerations raised with respect to the project, and any assessment of the effects of the project conducted by or on behalf of an Indigenous governing body (s. 22(1)(c), (g), (l) and (q));
- the purpose of and need for the designated project (s. 22(1)(d));
- alternative means of carrying out the designated project, or alternatives to the project, that are technically and economically feasible (s. 22(1)(e) and (f));
- the requirements of the follow-up program in respect of the designated project (s. 22(1)(k));
- community knowledge provided with respect to the project and comments received from the public (s. 22(1)(m) and (n));

- comments from another jurisdiction received during consultations, any other relevant assessment, or any study or plan conducted or prepared by another jurisdiction (s. 22(1)(o), (p) and (r));
- the intersection of sex and gender with other identity factors (s. 22(1)(s)); and
- any other matter relevant to the impact assessment that the Agency requires to be taken into account (s. 22(1)(t)).

[317] When establishing the process for considering the environmental costs and benefits of a designated project that potentially has an adverse federal effect, Parliament is constitutionally entitled to instruct the decision maker to consider the full range of costs and benefits of the project. In *Oldman River*, in which this Court upheld the constitutionality of the Guidelines Order as falling under federal jurisdiction, La Forest J. emphasized the need for “integrated” environmental and economic planning and management. He accepted that in evaluating “environmental quality” under the federal Guidelines Order, the Minister was not limited to considering “environmental quality as understood in a physical sense”, and could also take into account “socio-economic considerations” arising from the project (pp. 36-37). This conclusion flowed from the “diffuse” nature of the “environment”, which encompasses “the physical, economic and social environment” (pp. 63-64). He emphasized that “environmental and economic planning cannot proceed in separate spheres”, and thus “[e]conomic and

environmental planning and management must . . . be integrated” (p. 37 (emphasis added), quoting the “Brundtland Report” of the World Commission on Environment and Development, in the *Report of the National Task Force on Environment and Economy*, September 24, 1987, at p. 2). Justice La Forest therefore concluded that “the potential consequences for a community’s livelihood, health and other social matters from environmental change are integral to decision making on matters affecting environmental quality” (p. 37; see also pp. 66-68 and 72).

[318] Since *Oldman River*, this Court has re-affirmed that a federal environmental assessment of a project may consider “the overall environmental costs”, including “effects within a province” (*National Energy Board*, at pp. 191 and 193). For federal environmental assessment purposes, federal authorities may assess “all matters in relation to the project as proposed” by the proponent (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 40; see also para. 41). Commentators have acknowledged that “federal authorities may look beyond those project components that will impact federal matters, and include all related components and activities in the scope of assessment. . . . [T]he federal government may ask proponents to provide information related to all of a project’s positive and adverse effects in order to have a comprehensive picture to inform decision making” (Johnston, at pp. 108 and 110; see also MacLean, Doelle and Tollefson, at pp. 42 and 44-45; Doelle, at pp. 72 and 77).

[319] We therefore agree with the majority that a federal environmental assessment “is not restricted to considering environmental effects that are ‘federal’ in nature” and has “wide latitude to evaluate the project’s anticipated effects” (paras. 157 and 161). This is essential for federal authorities to make *an integrated decision* as to the designated project’s overall costs and benefits.

(d) *The Decision-Making Phase (the Public Interest Determination)*

[320] Lastly, the decision-making phase in ss. 60 to 63 of the *IAA* requires a cost-benefit analysis based on public interest factors identified in s. 63, including the extent to which the designated project contributes to sustainability, has adverse federal effects that are significant as indicated in the impact assessment report, has an impact on any Indigenous group or adverse effects on the rights of Indigenous peoples protected under s. 35 of the *Constitution Act, 1982*, and hinders or contributes to the Government of Canada’s ability to meet its environmental obligations and climate change commitments. Section 63 requires a *reasonable* and *proportionate* weighing of the public interest factors in deciding whether a project may proceed, and if so, whether any conditions should be imposed.

[321] In our view, the integrated public interest decision-making process contemplated under the *IAA* — a process involving a cost-benefit balancing of the adverse federal effects and all other relevant public interest considerations relating to the project — falls within federal legislative jurisdiction.

[322] As a matter of precedent and constitutional principle, this Court's decision in *Oldman River* highlighted the importance of not just *integrated federal information collection* at the impact assessment stage, but also *integrated federal decision making* at the public interest determination stage. Justice La Forest stated that it would be "unduly myopic" to confine environmental decision making to questions of the "biophysical environment alone", and highlighted the need to have integrated "[e]conomic and environmental planning and management" (p. 37).

[323] To illustrate this point, La Forest J. later gave the example of a decision to approve the location and construction of a new railway line (a federal undertaking), which would have environmental and human health impacts that would otherwise fall under provincial jurisdiction. He explained that it "defies reason" and "would lead to the most astonishing results" to say that Parliament would be precluded from considering provincial harms in deciding whether to allow the railway line to proceed (p. 66).

[324] Justice La Forest went on to reiterate that, provided federal environmental legislation is anchored in a federal head of power or a federal aspect, the federal legislation may consider impacts within provincial jurisdiction, even though provinces may legislate regarding the same fact situation from a provincial aspect under the double aspect doctrine. As he explained:

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within

provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here. [p. 69]

[325] We agree with Professors Hogg and Wright's view that "[t]he effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental impact assessment of any project that has any effect on any matter within federal jurisdiction" (§ 30:32; see also Doelle, at pp. 66-71; Johnston, at pp. 111-16; MacLean, Doelle and Tollefson, at pp. 42-45).

[326] It also bears noting that the *IAA* provides for joint federal-provincial environmental review and assessment and requires federal authorities to consider provincial comments and assessments to promote cooperative federalism and help alleviate potential jurisdictional concerns (Johnston, at pp. 110-11). The *IAA* allows federal authorities to substitute a provincial assessment for the federal assessment on the request of provincial authorities (s. 31(1)), to delegate a federal assessment to provincial authorities (s. 29), and to provide for a joint federal-provincial assessment (s. 39(1)). A federal impact assessment must also consider comments from provincial authorities received during consultations, a relevant provincial assessment, and any study or plan conducted or prepared by a province (s. 22(1)(o), (p) and (r)). Provincial participation is thus integrated into the *IAA* scheme as a matter of cooperative federalism. When a federal impact assessment occurs without provincial cooperation, "it would be unreasonable not to extend decision-making authority [of federal

authorities] to the consideration of all [aspects] of a project's impacts, benefits, risks, and uncertainties" (Johnston, at p. 117).

[327] In our view, as long as the public interest decision is anchored in federal jurisdiction based on adverse federal effects, federal authorities are entitled to make an integrated and proportionate decision that weighs the costs and benefits of allowing the project to proceed, and, if it is allowed to proceed, whether conditions should be imposed.

[328] Nevertheless, the majority concludes that the public interest decision under s. 63 of the *IAA* exceeds Parliament's jurisdiction in two respects. First, the majority says that, to be constitutional, the dominant thrust of the public interest factors must focus on the project's federal effects, rather than the adverse federal effects and the other adverse, non-federal considerations (paras. 167 and 178). The majority notes that, although the assessment process can consider non-federal considerations, "at the ultimate decision-making juncture, the focus on federal impacts must be restored" (para. 177). Second, the majority claims that, during the public interest decision making, federal authorities are constitutionally unable to consider the project as a whole, and they may consider only its adverse federal effects (para. 174). The majority says that the public interest decision-making process under the *IAA* "transforms what is *prima facie* a determination of whether adverse federal effects are in the public interest into a determination of whether the project as a whole is in the public interest" (para. 166). We disagree on both points.

[329] The first objection — that public interest decision making under the *IAA* is unconstitutional because it allows for consideration of adverse, non-federal considerations — conflicts with this Court’s guidance in *Oldman River* that a federal environmental assessment process can involve an *integrated* decision-making process that weighs *both* the federal *and* non-federal harms that may be caused by a designated project, with any benefits that may accrue from the project. To repeat La Forest J.’s comments in *Oldman River*, “it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns” (p. 66).

[330] Thus, as the late Professor Doelle correctly notes, “we can take from *Oldman* that when there is a clear impact on an area of federal jurisdiction, the decision whether to allow the project to go ahead in spite of the impact can be an integrated decision that takes into account issues that are within provincial jurisdiction” (p. 75). Moreover, “[t]here is no reason to suggest that harm in an area of provincial jurisdiction should be treated differently than benefits. . . . [I]f there is jurisdiction to make a federal project decision, that decision can be influenced by health and employment benefits as much as it may be influenced by potential harm to forests or risk of harm to the health and welfare of local citizens” (p. 75, fn. 78). Simply put, “[i]t does not serve to protect provincial jurisdiction to force the federal decision . . . to be made in a partially blind manner” (p. 68).

[331] To give a concrete example, on the majority's view, there is (properly) no constitutional objection to federal authorities prohibiting a nickel refinery in a province — a provincially regulated project — which has substantial economic benefits that are outweighed by substantial environmental harms to Indigenous peoples, Indigenous lands, or the rights of Indigenous people protected under s. 35 of the *Constitution Act, 1982* because such harms are adverse federal effects under the *IAA*. But, on the majority's view, if the same project caused less substantial but still significant harm to Indigenous interests (thus triggering an adverse federal effect), federal authorities could not constitutionally prohibit the project on the basis that it might cause cancers or respiratory diseases to non-Indigenous peoples in neighbouring communities, because this would be to consider a constitutionally impermissible non-federal effect. To quote La Forest J. in *Oldman River*, this approach “defies reason” (p. 66).

[332] The majority's second objection to the constitutionality of the public interest decision-making process under the *IAA* — that federal authorities may not constitutionally consider the project as a whole, but only its adverse federal effects — is just as problematic for largely the same reasons. The majority's view again departs from the integrated decision-making process *for the project* recognized in *Oldman River*. In *Oldman River*, in discussing what federal decision makers may consider in determining whether to approve a dam (a provincial undertaking) that has effects on navigation (a federal matter), Justice La Forest stated that the federal government must be able to look beyond federal effects, as, otherwise, the dam would never be approved

because, by its “very nature”, it “interfere[s] with, or impede[s] navigation” (p. 39). He continued:

If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances. [p. 39]

The majority, at para. 158, confines this guidance from *Oldman River* to the information-gathering phase, even though La Forest J. expressly wrote of decisions to “approve” the project.

[333] Thus, the public interest decision-making process under the *IAA* cannot be limited to whether “adverse federal effects are in the public interest” without considering other factors (majority reasons, at para. 166). As *Oldman River* recognized, adverse federal effects will rarely, if ever, be in the public interest. To be in the public interest, adverse federal effects need to be outweighed by other *positive benefits of the project*. As Anna Johnston explains:

In many (if not most) cases, it is unlikely that federal impacts will be positive. Thus, inherent in federal environmental decision making of all projects is the consideration of socio-economic benefits that will flow from a project and that will (or will not) outweigh the negative impacts on fish navigation, or other areas of federal responsibility. [Footnote omitted; p. 113.]

[334] In like manner, as noted by Professors Marie-Ann Bowden and Martin Z. P. Olszynski, to suggest that it is constitutional for federal authorities to consider whether a project has economic benefits, but unconstitutional for them to consider whether the same project promotes sustainable development, would be “to suggest that the Constitution is inherently and permanently biased towards an out-dated and discredited model for economic growth — a seemingly untenable proposition” (“Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment” (2010), 89 *Can. Bar Rev.* 445, at p. 484).

[335] In closing on this point, we hasten to add that, if federal authorities tried to rely on a trivial adverse federal effect as a “constitutional Trojan horse” enabling them, “on the pretext of some narrow ground of federal jurisdiction”, to conduct a far ranging inquiry into a designated project, the federal action would be subject to judicial review on administrative law grounds (*Oldman River*, at p. 71). Such a federal decision in a particular case would be unreasonable as being contrary to the object and purpose of the *IAA*.

[336] We conclude that the public interest decision-making process under the *IAA* is constitutional, provided that it is anchored in adverse federal effects within Parliament’s legislative jurisdiction. We address that issue next.

(2) The Defined “Effects Within Federal Jurisdiction” Fit Within Parliament’s Legislative Jurisdiction

[337] The defined “effects within federal jurisdiction” under s. 2 of the *IAA*, which serve as “triggers” or gateways for the prohibitions under s. 7 and for the application of the designated projects scheme of the *IAA*, each fall under Parliament’s legislative jurisdiction under the *Constitution Act, 1867*. None of the adverse federal effects is constitutionally overbroad.

(a) *Protecting “Fish and Fish Habitat” and “Aquatic Species” Falls Under Parliament’s Power Over the Sea Coast and Inland Fisheries*

[338] The *IAA* defines “effects within federal jurisdiction” as including a change to the component of the environment involving “fish” and “fish habitat”, as defined in s. 2(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14, or “aquatic species”, as defined in s. 2(1) of the *Species at Risk Act*, S.C. 2002, c. 29. The *Fisheries Act* defines “fish” broadly, and as including marine animals. It also defines “fish habitat” as meaning “water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas”. The *Species at Risk Act* defines “aquatic species” as meaning a wildlife species that is a fish or a marine plant as defined under the *Fisheries Act*. Properly interpreted, the *IAA*’s inclusion of changes to the environment of fish, fish habitat, and aquatic species as an adverse federal effect protects non-trivial or more than *de minimis* changes to this component of the environment.

[339] Prohibiting any change to fish, fish habitat, and aquatic species under the IAA as an adverse federal effect is properly anchored in Parliament's exclusive authority over the sea coast and inland fisheries under s. 91(12) of the *Constitution Act, 1867*. The s. 91(12) power includes the authority to "legislate for the preservation of fish" and to "protect the environment of fish" and other aquatic species (Hogg and Wright, at § 30:26 (footnote omitted); Beaudoin, at p. 830; *Northwest Falling Contractors*, at p. 300). Preventing "substances deleterious to fish [from] entering into waters frequented by fish" is a proper concern of federal legislation under s. 91(12) (*Northwest Falling Contractors*, at p. 301). The power to control and regulate the resource "must include the authority to protect all those creatures which form a part of that system" (p. 300). The fisheries power includes "not only conservation and protection, but also the general 'regulation' of the fisheries, including their management and control" (*Ward*, at para. 41). The fisheries power extends to protection of the animals that inhabit the seas, but also embraces "commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation" (para. 41).

[340] This conclusion is consistent with *Fowler*, where this Court held that a provision of the *Fisheries Act*, R.S.C. 1970, c. F-14, exceeded federal legislative competence because it sought to prohibit broadly putting "debris into any water frequented by fish", without any threshold of "actual or potential harm to fisheries" (pp. 216 and 226). *Fowler* involved an offence creating a general prohibition of certain conduct — in *any* circumstances — whether or not it would likely harm fish. By

contrast, the *IAA* contains a threshold of harm to fish or fish habitat by focussing on preventing likely and significant adverse federal effects, subject to the public interest considerations. It also involves an *assessment regime*, which is project-specific and has as its core the question of whether there are likely adverse federal effects.

[341] As a result, the component of the definition of adverse federal effect involving the protection of fish, fish habitat, and aquatic species is constitutional.

(b) *Protecting “Migratory Birds” Falls Under Parliament’s Imperial Treaty Power*

[342] The *IAA* defines “effects within federal jurisdiction” as including a change to the component of the environment including “migratory bird[s]”, as defined in s. 2(1) of the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22. The *Migratory Birds Convention Act, 1994* defines a “migratory bird” as meaning a migratory bird referred to in the *Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, August 16, 1916, [1917] Gr. Brit. T.S. No. 7 (Cd. 8476) (“Migratory Birds Convention”), and includes the sperm, eggs, embryos, tissue cultures, and parts of the bird. Properly interpreted, the *IAA* protects non-trivial or more than *de minimis* changes to the component of the environment involving migratory birds.

[343] The Migratory Birds Convention is an imperial treaty entered into between the United Kingdom and the United States of America, and thus falls under

Parliament's legislative power to implement imperial treaties under s. 132 of the *Constitution Act, 1867*. Canada implemented the Migratory Birds Convention through the *Migratory Birds Convention Act, S.C. 1917, c. 18*. When Canada and the United States amended the Migratory Birds Convention in 1994, Parliament implemented the amended Convention by adopting the *Migratory Birds Convention Act, 1994 (Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, Can. T.S. 1999 No. 34)*.

[344] Protecting migratory birds under the *IAA* as an “effect within federal jurisdiction” is properly anchored in Parliament's exclusive authority to implement imperial treaties under s. 132 of the *Constitution Act, 1867*. The purpose of the Migratory Birds Convention, as stated in its recital, is to preserve and protect migratory birds given their significant environmental and ecological importance. Migratory birds are stated to be “of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both Canada and the United States, but are . . . in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds”.

[345] As a result, the migratory birds component of the definition of adverse federal effect is constitutional.

(c) *Protecting the Indigenous Peoples of Canada and Their Rights Falls Under Parliament's Power Over "Indians, and Lands Reserved for the Indians"*

[346] The *IAA* defines “effects within federal jurisdiction” as including a change to the component of the environment with respect to the Indigenous peoples of Canada — occurring in Canada and resulting from a change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site, or thing that is of historical, archaeological, paleontological or architectural significance. It also includes any change occurring in Canada to the health, social, or economic conditions of the Indigenous peoples of Canada.

[347] Protecting the components of the environment affecting Indigenous peoples and their rights falls under Parliament’s exclusive legislative jurisdiction over “Indians, and Lands reserved for the Indians” in s. 91(24) of the *Constitution Act, 1867*. A critical aspect of s. 91(24) relates to the protection of, and concern for, the welfare of the Indigenous peoples of Canada (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at paras. 4-5, 13-15 and 49-50; *Canadian Western Bank*, at paras. 60-61; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 176; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 109 and 126; R. Boivin, “À qui appartient l’obligation de fiduciaire à l’égard des autochtones?” (1994), 35 *C. de D.* 3, at p. 13). The *IAA* falls under Parliament’s protective legislative authority involving Indigenous peoples by requiring the early

identification and safeguarding of the interests of Indigenous peoples and by facilitating their meaningful participation in assessing the impacts of a designated project.

[348] Section 91(24) is a broad power (Hogg and Wright, at § 28:2). It is well established that Indigenous peoples in Canada are uniquely impacted by major projects precisely because of their Indigeneity and the distinctive challenges they face. In our view, the definition of effect within federal jurisdiction involving the Indigenous peoples of Canada and their rights is constitutional.

(d) *The Protection Against Interprovincial and International Pollution Falls Under the National Concern Branch of Parliament's Peace, Order, and Good Government Power*

[349] The IAA defines “effects within federal jurisdiction” as meaning, among other things, a change to a component of the environment that would occur in a province other than one in which the act or thing is done and a change to the environment that would occur outside Canada. Collectively, these aspects of the definition of effects within federal jurisdiction target interprovincial and international pollution.

[350] This Court has accepted that federal jurisdiction over several forms of international and interprovincial pollution can be grounded under the national concern branch of Parliament's residuary power of peace, order, and good government in the introductory words of s. 91 of the *Constitution Act, 1867*. Parliament has recognized legislative jurisdiction over the prevention of marine pollution and the pollution of

interprovincial rivers (*Crown Zellerbach*, at pp. 417 and 438; *Interprovincial Co-operatives*, at pp. 513-14 and 520). The Court’s jurisprudence has “consistently reflected the view that interprovincial pollution is constitutionally different from local pollution” (*References re GGPPA*, at para. 195). As noted by Professors Hogg and Wright, Parliament has jurisdiction “over international and interprovincial rivers, where pollution in one province will be carried into other provinces or countries” (§ 30:32). They note that “[t]he national concern branch of the peace, order, and good government power will support measures to control pollution of air or water that are beyond the capacity of the provinces to control” (§ 30:32). Because provincial legislative jurisdiction is territorially restricted to pollution “in the province”, only Parliament can legislate in relation to interprovincial and international pollution (*Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86, at pp. 128-29). As this Court has recognized, “the basic rule is that general legislative authority in respect of all that is not within the provincial field is federal” (*Interprovincial Co-operatives*, at p. 514).

[351] We agree with Canada’s concession that greenhouse gas (“GHG”) emissions — although relevant to the public interest determination — will generally not be an effect within federal jurisdiction under the *IAA*’s definition. Under the *IAA*’s project-specific approach, the federal government would need to show that an individual project’s GHG emissions would cause a non-trivial change to the environment in another province or outside Canada. If Canada attempts to treat a project’s GHG emissions as an effect within federal jurisdiction, then whether an

individual project's GHG emissions, in context of the global scale of the climate crisis, may cause non-trivial changes to the environment is best assessed through case-specific judicial review of whether a particular exercise of discretion is consistent with the national concern test, set out in the *References re GGPPA*. Nor, we would add, is there any evidence that Canada has ever treated GHG emissions as an effect within federal jurisdiction in administering the *IAA*. While the Minister has referred to a project's GHG emissions when discussing the impacts of a project that was otherwise not in the public interest, we are not aware of any instance in which GHG emissions have themselves ever been relied on as an effect within federal jurisdiction (see Impact Assessment Agency of Canada, *Minister's Response: Vista Coal Underground Mine Project and Vista Mine Phase II Expansion Project*, September 29, 2021 (online), explaining that a mine was designated based on potential adverse effects on fisheries and Indigenous peoples; Suncor Energy Inc., *Base Mine Extension: Initial Project Description*, February 2020 (online), identifying potential adverse impacts on fisheries, aquatic species, and migratory birds). The majority refers to two letters from federal officials that identified GHG emissions as "unacceptable environmental effects", but those letters simply described GHG emissions as a "facto[r] . . . considered in the determination of whether the adverse effects of the Project within federal jurisdiction are in the public interest" (para. 188; *Letter from the Honourable Steven Guilbeault to Suncor Energy Inc.*, April 6, 2022 (online); *Letter from the Honourable Jonathan Wilkinson to Coalspur Mines (Operations) Ltd.*, June 11, 2021 (online), similarly describing concerns regarding GHG emissions as "factors weigh[ing] against the public interest"). And although Canada may have contemplated treating GHG emissions as an

effect within federal jurisdiction in a discussion paper when proposing the Regulations, neither the Regulations nor the Regulatory Impact Analysis Statement take that position. Rather, Canada rejected proposals to use GHG emissions as a standalone basis for an effect within federal jurisdiction.

[352] But to repeat: if particular exercises of federal authority under the *IAA* seek to stretch the boundaries of Parliament’s constitutional authority to regulate international and interprovincial pollution, including potentially GHG emissions, such instances can be addressed in future cases reviewing concrete government action and with the benefit of a well-developed evidentiary record. It is “neither necessary nor desirable” to address “speculative concern[s]” regarding potential misuse of the *IAA* in this reference (*References re GGPPA*, at para. 220).

[353] As a result, in our view, the component of the definition of “effects within federal jurisdiction” involving interprovincial and international pollution is constitutional.

(3) Conclusion on Classification

[354] Each of the defined effects within federal jurisdiction under s. 2 of the *IAA* that form the backbone of the *IAA* is properly classified as falling under Parliament’s exclusive legislative jurisdiction under the *Constitution Act, 1867* over the sea coast and inland fisheries (s. 91(12)), imperial treaties (s. 132), “Indians, and Lands reserved

for the Indians” (s. 91(24)), and peace, order, and good government (s. 91). As a result, the IAA and Regulations are *intra vires* in their entirety.

C. *Provincial Undertakings Are Not Immune From Federal Environmental Assessment Under the Doctrine of Interjurisdictional Immunity*

[355] In closing, we comment briefly on Alberta’s alternative argument that if the IAA is constitutionally valid, then the IAA and Regulations are constitutionally inapplicable to provincial undertakings under the doctrine of interjurisdictional immunity.

[356] Under the doctrine of interjurisdictional immunity, the “core” of a federal or provincial legislative power is protected from impairment by the other level of government (*Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 59; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“COPA”), at para. 26). The doctrine is applied in two steps (*Rogers Communications*, at para. 59; *COPA*, at para. 27). The court first asks whether legislation adopted by one level of government trenches on the “core” of the power of the other level of government. If it does, the court then asks whether the effect of the statute on the protected core is sufficiently serious to trigger the doctrine’s application.

[357] Alberta asserts that applying federal environmental assessment legislation would impair the “core” of the province’s legislative powers under several provisions

of the *Constitution Act, 1867*: ss. 92(5) (management and sale of the public lands belonging to the province and of the timber and wood thereon), 92(10) (local works and undertakings), 92(13) (property and civil rights in the province), 92(16) (matters of a merely local or private nature in the province), 92A(1) (non-renewable natural resources, forestry resources, and electrical energy), and 109 (property in all lands, mines, minerals, and royalties). We would not give effect to this argument.

[358] In *Oldman River*, Justice La Forest dismissed the notion that characterizing a project as “provincial” could be a basis to reject the application of federal environmental assessment legislation to a project. He stated that such an approach “begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation” (p. 68; see also Johnston, at p. 116).

[359] In addition, more recently this Court has held that the doctrine of interjurisdictional immunity must be applied with restraint and is generally reserved for situations already covered by precedent (*Canadian Western Bank*, at paras. 77-78; *COPA*, at para. 36; *Rogers Communications*, at para. 63; *References re GGPPA*, at para. 124). As was found in the *Reference re Genetic Non-Discrimination Act*, “[i]n keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed

‘watertight compartments’ approach has long since been overtaken and the doctrine of interjurisdictional immunity has been limited” (para. 22).

[360] Alberta offered no precedent to support the application of the doctrine of interjurisdictional immunity to the heads of provincial power invoked here. As a result, we see no basis to apply the doctrine in the circumstances.

VI. Conclusion

[361] In our opinion, the *IAA* and the Regulations fall within the legislative competence of the Parliament of Canada under the *Constitution Act, 1867*. As a result, the constitutional questions should be answered in the negative and the appeal allowed. The motion to adduce new evidence should be dismissed.

Appeal allowed in part.

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