FROM "GUIDELINE ORDER" TO "IMPACT ASSESSMENT": THE EVOLUTION OF FEDERAL ENVIRONMENTAL ASSESSMENT LEGISLATION IN CANADA

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Federal and provincial governments across Canada have enacted comprehensive environmental assessment processes to evaluate the benefits and burdens of significant proposed infrastructure and resource activities. In recent years, federal processes have become a focal point for jurisdictional tensions, including conflicts over the regulation of major projects, natural resource development, and greenhouse gas emissions. In the wake of the Supreme Court of Canada's landmark 2023 reference opinion in Reference re Impact Assessment Act*, this article follows the evolution of federal environmental impact legislation from its inception during the 1980s to the impugned legislation. Beginning with the development of the Environmental Assessment and Review Process Guidelines Order and its subsequent 1992 legal challenge at the Supreme Court in* Friends of the Oldman River Society v. Canada (Minister of Transport)*, we provide a high-level overview of the successive legal and procedural frameworks governing environmental assessment in Canada. Special attention is given to jurisdictional issues considered in the 2023 Supreme Court reference opinion and anticipated amendments to the present iteration of the governing legislation.*

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I. INTRODUCTION

In 1992, a unanimous Supreme Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*[1] found Canada's first binding federal environmental assessment

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1 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*] (Stevenson J, dissenting in part on issues unrelated to *vires*).

(EA) legislation, the Environmental Assessment and Review Process Guidelines Order[2] wholly constitutional. Almost 32 years later, a five to two majority of the Supreme Court of Canada determined that the current federal EA legislation, the *Impact Assessment Act*,[3] is largely unconstitutional in the *Reference re Impact Assessment Act*.[4] While still technically in force, the Federal Court has already set aside a project designation made by the federal Minister under section 9 of the *IAA* on the basis of the Supreme Court's decision in the *IAA Reference*.[5] More recently, a consent order submitted by Canada and Ontario also has been issued which renders void a designation of Highway 413 as a "designated project,"[6] while the Federal Court of Appeal has dismissed an appeal of a challenge to regulations under the *IAA* on the basis of mootness.[7] Details of proposed legislation to amend the *IAA* in the wake of the Supreme Court's *IAA Reference* decision have been released just as this article goes to publication.

The Supreme Court's *Oldman River* and the *IAA Reference* decisions bookend a period of significant transformation in the way the federal government and its agencies review and approve major industrial and infrastructure projects in Canada. During this time, federal EA legislation has evolved from a wholly constitutional planning tool designed to inform federal decision-making on matters related to the environment into a comprehensive assessment and regulatory regime that exceeds federal jurisdiction[8] — that is, from a procedural guidelines order to a comprehensive impact assessment and regulatory regime. As the Supreme Court of Canada majority noted in the *IAA Reference*, there have been two trends of significance to the current moment. First, federal EA processes have undergone a "dramatic shift" from a process that was triggered where the federal government had a pre-existing decision-making responsibility in respect of a particular activity (a "decision-based trigger"), to a framework that applies on the basis of the types of projects involved or the types of effects these projects may cause (a "project-based" trigger) without a clear connection in many cases to an independent federal decision.[9] Second, the scope of the federal EA has grown from a focus on adverse environmental effects that, if found to be significant, could be nevertheless justified in the circumstances, to a broad public interest determination based on a project's positive or negative environmental, social, health, and economic impacts.[10] Following the Supreme Court's decision in the *IAA Reference*, Parliament's jurisdiction to enact legislation to replace the *IAA* is not in doubt;[11] but how it can and should do so remains highly contentious.

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2 *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [*EARPGO*].
3 *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].
4 *Reference re Impact Assessment Act*, 2023 SCC 23 [*IAA Reference* SCC].
5 *Ermineskin Cree Nation v Canada (Minister of Environment and Climate Change)* (18 December 2023), Ottawa T-1654-21 (judgment on consent). This judgment, which was consented to by the Attorney General of Canada, noted as ground for the judgment that "the majority of the Supreme Court found that the 'designated projects' portion of the [*IAA*] is ultra vires Parliament." The designation at issue in that case concerned mining projects located entirely within the province of Alberta.
6 *Ontario (AG) v Canada (Governor in Council)* (15 April 2024), Ottawa T-2233-23 (FC) (judgment on consent).
7 *Sierra Club Canada Foundation v Canada (Environment and Climate Change)*, 2024 FCA 86.
8 *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 100 [*IAA Reference* ABCA]; *IAA Reference* SCC, *supra* note 4 at paras 16, 32.
9 *IAA Reference* SCC, *ibid* at para 13.
10 *IAA Reference* SCC, *ibid* at paras 5–6.
11 *Ibid* at para 7.

The following discussion proceeds in nine parts. In Part II, the circumstances and background leading to the enactment of *EARPGO* (1984 to 1995) as the first federal EA legislation in Canada are described.[12] In Part III, the Supreme Court of Canada's decision concerning *EARPGO* in *Oldman River* and the consequences this would have for the subsequent evolution of federal EA legislation are discussed. In Part IV, the major features of the *Canadian Environmental Assessment Act, 1992*[13] (1995 to 2012), enacted in response to *EARPGO* are described and analyzed. In Part V, the legal challenges surrounding the scope of federal EAs under *CEAA 1992* are discussed. In Part VI, the changes to federal EA legislation introduced by the *Canadian Environmental Assessment Act, 2012*[14] (2012 to 2019) are discussed. In Part VII, the key features of the impugned *IAA* (2019 to present) are addressed. In Part VIII, the reasons underpinning the Supreme Court majority's opinion in the *IAA Reference* are discussed. In Part IX, proposed amendments to the *IAA* in response to the majority's reasons are discussed. Finally, in Part X, the path forward for constitutionally sound federal EA legislation is considered.

In conclusion, it is suggested that a key feature of this evolution is that appropriate boundaries of the discretion to scope federal assessment and decision-making according to the constitutional basis for federal engagement with the project have eroded over the course of successive versions of federal EA legislation. The *IAA* established a substantive regulatory regime that applies to designated projects without regard for whether the project is one over which federal authorities have comprehensive jurisdiction as life cycle regulators, or have only limited jurisdiction over an aspect or aspects of the project that may result in effects that touch on matters subject to an existing federal legislative jurisdiction (with no defined materiality threshold). In our view, proposed amendments to the legislation do not change the fundamental structure of the *IAA*, which the Supreme Court found problematic. An unnecessary constitutional question mark will continue to hang over top of the *IAA* if changes to the *IAA* are limited to the proposed amendments. This, in turn, creates regulatory and litigation risk and uncertainty for investors. Understanding the evolution of specific features which have moved federal EA legislation away from the constitutional guidelines expressly stated or implicitly assumed in *Oldman River* provides a blueprint to return federal EA legislation to its constitutional boundaries, while ensuring that robust assessments are carried out where federal authorities have jurisdiction.

II. *EARPGO*

The beginnings of formal EA processes as one would recognize them today are attributed generally to increasing judicial recognition for environmental rights during the 1960s and 1970s,[15] and specifically to the United States' enactment of a federal EA process through the *National Environmental Policy Act* in 1969.[16] *NEPA* mandated consideration of environmental consequences for major federal actions in the US, including energy projects, through the requirement of Environmental Impact Statements. A centralized

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12 *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [*EARPGO*].
13 *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA 1992*].
14 *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*].
15 *Scenic Hudson Preservation Conference v Federal Power Commission*, 354 F (2d) 608 (2nd Cir 1965).
16 *National Environmental Policy Act of 1969*, Pub L No 91-190, 83 Stat 852 (1970) [*NEPA*]; Sandra K McCallum, "Environmental Impact Assessment: A Comparative Analysis of the Federal Response in Canada and the United States" (1975) 13:3 Alta L Rev 377.

agency used these statements to evaluate the potential environmental effects of proposed actions and provide a basis for informed decision-making by federal agencies. Unlike Canadian federal EA legislation, *NEPA* has remained largely unchanged in its basic structure since its inception.[17]

Canada's first federal EA legislation, *EARPGO*, evolved out of the non-binding federal Environmental Assessment and Review Process (the EARP), which developed in the early 1970s partly in response to *NEPA*.[18] The EARP directed (but did not legally require) authorities responsible for federal government projects and projects requiring federal money, land, or approval to conduct "self-assessment" to determine whether, how, and when EA would be appropriate in the course of decision-making. As Robert Gibson and Phillip Hanna have described,[19] the EARP was intentionally developed as a non-binding policy due to interdepartmental concerns about an anticipated expansion of the new Department of the Environment at the expense of established departments, as had been the US experience under *NEPA*, as well as concerns over a loss of discretion and flexibility and discomfort with increased public scrutiny or potential litigation under a mandatory EA process.

Despite resistance at the bureaucratic level, expectations for Canadian EA legislation comparable to *NEPA* grew during the 1970s as an emerging and cohesive theory of EA took root in Canada.[20] Key to this development was the prominent example of the Mackenzie Valley Pipeline Inquiry, which pioneered a comprehensive public hearing and expert review process between 1974 and 1977 that in many ways resembles a modern panel review. The Inquiry resulted in 40,000 pages of text and evidence, a ten-year moratorium on the construction of a natural gas line following the Mackenzie River Valley, and the beginning of the current era of comprehensive land claims agreements with northern Indigenous peoples.[21]

EARPGO's passage in 1984 as an order in council marked the first formal enactment of a federal EA regime as legislation; however, its status as legislation and whether its

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17 The 2023 *Fiscal Responsibility Act* introduced the latest amendments to *NEPA*. As noted by commentators, the amendments largely track existing regulations and federal case law interpreting *NEPA*, the modifications will not significantly change how *NEPA* is applied in practice sought to amend *NEPA* for the first time since its inception: see e.g. Bella Wolitz et al, "Much Ado About NEPA" (2 June 2023), online (blog): [perma.cc/QN95-JCFG].

18 Robert B Gibson & Kevin S Hanna, "Progress and Uncertainty: The Evolution of Federal Environmental Assessment in Canada," in Kevin S Hanna, ed, *Environmental Impact Assessment: Practice and Participation*, 2nd ed (Don Mills, ON: Oxford University Press, 2009) at 21.

19 *Ibid*. See also Robert B Gibson, "From Wreck Cove to Voisey's Bay: The Evolution of Federal Environmental Assessment in Canada" (2002) 20:3 Impact Assessment & Project Appraisal 151; Beverly Hobby, *Canadian Environmental Assessment Act: An Annotated Guide* (Toronto: Thomson Reuters, 2023) (loose-leaf revision, Rel 1, 2021 supplement) at CEAA 1992-1; M Husain Sadar & William J Stolte, "An Overview of the Canadian Experience in Environmental Impact Assessment (EIA)" (1996) 14:2 Impact Assessment 215; Ron R Wallace, "Assessing the Assessors: An Examination of the Impact of the Federal Environmental Assessment and Review Process on Federal Decision Making" (1986) 39:3 Arctic 240.

20 Gordon E Beanlands & Peter N Duinker, *An Ecological Framework for Environmental Impact Assessment in Canada* (Halifax: Institute for Resource and Environmental Studies, 1983).

21 Justice Thomas R Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, vol 1 (Ottawa: Minister of Supply and Services Canada, 1977). Note that the Inquiry was conducted outside the nascent EARP process pursuant to an Order of the Privy Council granting Justice Thomas Berger broad authority to hold hearings, summon witnesses and expert panels, and establish practices and procedures at his discretion.

application to federal decisions was mandatory would remain in question until both issues were affirmed through a series of cases culminating in *Oldman River*, discussed below.[22] *EARPGO* formalized and expanded on the essential discretionary features that had evolved under the EARP. *EARPGO* mandated that an "initiating department" with federally delegated decision-making authority conduct an initial screening decision to determine whether a proposal may give rise to "any potential[ly] adverse environmental effects."[23] The definition of "proposal" under *EARPGO* included "any initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility."[24] Importantly then, *EARPGO* applied where there was a federal decision-making responsibility independent and apart from any decision-making under *EARPGO* itself.

If a proposal could have a significant adverse effect on the environment, *EARPGO* required the initiating department to refer the proposal to an environmental assessment review panel, which would examine the environmental effects of the proposal and the directly related social impacts of those effects.[25] "Environmental effects" were not defined in the legislation but were, as a matter of practice, limited to effects related to physical activities requiring a federal decision. Further consideration of "the general socio-economic effects of the proposal … and the need for the [project] (proposal)" required ministerial approval.[26]

Despite *EARPGO*'s mandatory language, federal departments continued to view this "guidelines order" more as a guideline than as an order, and therefore discretionary. Permits and approvals were issued without completing or even undertaking an Environmental Impact Assessment, leading to criticism by academics, public interest groups, and environmental groups.[27]

III. *OLDMAN RIVER*

Oldman River originated in one such case of federal reluctance to apply *EARPGO*. In April of 1989, an Alberta-based environmental organization, Friends of the Oldman River Society (the Society), applied to the Federal Court for certiorari and mandamus, seeking to compel a federal EA of a hydroelectric project then under development by the Government of Alberta. By the time of the originating application, provincial authorities had undertaken various ad hoc public consultations over the preceding decade but had refused to conduct a further public hearing under the provincial *Hydro and Electric Energy Act*.[28] The federal Minister of Transportation granted the province approval under the *Navigable Waters Protection Act* (*NWPA*) to undertake construction affecting navigable waters, based solely on a consideration of the project's effect on navigation. The Minister refused the Society's requests to conduct a comprehensive Environmental Impact Assessment pursuant to *EARPGO*, relying on the provincial consultation process as having discharged any duty.

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22 *Friends of Oldman River Society v Canada (Minister of Transport)*, 1990 CanLII 8039 (FCA); *Canada (AG) v Saskatchewan Water Corp*, 1991 CanLII 7955 (SKCA); *Canadian Wildlife Federation Inc v Canada (Minister of the Environment)*, 1989 CanLII 7273 (FC).

23 *EARPGO*, *supra* note 2, s 10(1).

24 *Ibid*, s 2.

25 *Ibid*, s 25.

26 *Ibid*, ss 4, 25.

27 Gibson & Hanna, *supra* note 18 at 23–24.

28 *Hydro and Electric Energy Act*, RSA 1980, c H-13.

Although denied at trial, the Society successfully obtained an order from the Federal Court of Appeal quashing the Minister's approval and ordering the Minister of Transport — as well as the Minister of Fisheries and Oceans — to comply with *EARPGO*. On appeal, the Supreme Court of Canada upheld the order quashing the *NWPA* approval, but stopped short of mandating both ministers to conduct an EA of the project. The Supreme Court's decision had four practical results that would make *Oldman River* a watershed case in the evolution of federal EA legislation, as well as with respect to jurisdiction over environmental matters generally.

First, *Oldman River* clearly established that *EARPGO* was mandatory legislation and was legally binding on an initiating department (in this case, the Minister of Transport). This point had been in question given *EARPGO*'s evolution from a nonbinding process and its enactment under an enabling statute that contemplated the establishment of "guidelines" for use by federal departments, boards, and agencies. The unanticipated outcome of the *Oldman River* decision would cause federal authorities to take EA more seriously and hastened work on an intentionally legislated EA process.[29]

Second, the Supreme Court confirmed the proper construction of an "area of federal responsibility" in the definition of "proposal" in *EARPGO*:

> [T]he federal government, *having entered the field in a subject matter* assigned to it under s. 91 of the *Constitution Act, 1867, must have an affirmative regulatory duty* pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity.[30]

The requirement for an "affirmative regulatory duty," meaning Parliament had properly enacted decision-making legislation in a subject matter within its jurisdiction, appeared in section 6 and other sections of *EARPGO*.[31] In the Supreme Court's analysis, this affirmative regulatory duty was a trigger for *EARPGO*'s mandatory application by federal authorities. This triggering mechanism, which linked the application of *EARPGO* to a federal decision-making function under existing legislation, would be carried forward and serve as a foundation for the next iteration of federal EA legislation, *CEAA 1992*.

Third, the Supreme Court affirmed that the environment is a "constitutionally abstruse" matter,[32] over which both federal and provincial governments have jurisdiction to legislate. However, any legislation must "be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another."[33]

Fourth, the Supreme Court found *EARPGO* specifically, and the concept of federal EA as an information gathering process to facilitate decision-making generally, to be a constitutionally valid exercise of federal authority. As noted by Justice La Forest, "[a]lthough local projects will generally fall within provincial responsibility, federal

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29 Gibson & Hanna, *supra* note 18 at 25; Rodney Northey, *Guide to the Canadian Environmental Assessment Act* (Toronto: LexisNexis, 2018) (loose-leaf 2019 supplement) at 8.

30 *Oldman River*, *supra* note 1 at 47 [emphasis added].

31 See e.g. *EARPGO*, *supra* note 2, ss 12, 14.

32 *Oldman River*, *supra* note 1 at 64.

33 *Ibid* at 67.

participation will be required if the project impinges on an area of federal jurisdiction."[34] It is possible that an overly broad and incorrect interpretation of *Oldman River* emboldened the further expansion of a federal EA that would occur through subsequent legislation, culminating in the current *IAA*.

Key to the Supreme Court's finding on the constitutional validity issue was its characterization of *EARPGO* as an "adjunct of the federal legislative powers affected," being "in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions."[35] The Supreme Court was attentive to concerns that a federal EA regime could evolve into "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."[36] Yet, *EARPGO* found itself on constitutionally safe ground through its link to an affirmative regulatory duty and its modest scope.

In the Supreme Court's reading, *EARPGO* was "fundamentally procedural" and would not be engaged every time a project may have an environmental effect on an area of federal jurisdiction, but only where there was an existing legal duty or obligation.[37] Applying this reading, the Supreme Court found an affirmative regulatory duty in the Minister of Transport's duty under *NWPA* to approve an activity that substantially interferes with navigation but found no such duty in the Minister of Fisheries and Oceans' ad hoc power under the *Fisheries Act* (as in force at that time) to request information in assistance of a regulatory function. Consequently, the latter Minister could not be required under *EARPGO* to conduct an assessment of the Oldman River hydro project, and the Supreme Court declined to grant mandamus.[38]

Despite "environmental effects" being undefined in the legislation, the Supreme Court also took comfort in an assumption that the effects that would be considered during an assessment would necessarily be linked to the affirmative regulatory duty. Section 6 limited *EARPGO*'s application to proposals undertaken by an initiating department, for which the federal government made a financial commitment, located on lands administered by the federal government; or that "may have an environmental effect on an area of federal responsibility."[39] Justice La Forest, writing for the Supreme Court, noted that where an assessment was triggered solely by environmental effects in the latter situation, "the environmental effects to be studied can only be those which may have an impact on the areas of federal responsibility affected."[40]

The precise basis for this assumption is unclear, as the text of *EARPGO* does not make any special provision to this effect. It appears that the Supreme Court's assumption followed from *EARPGO*'s fundamental "auxiliary nature," which in the Supreme Court's analysis was sufficient to ensure that decision-making maintained "the necessary element of proximity that must exist between the impact assessment process and the subject matter

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34 *Ibid* at 69.
35 *Ibid* at 75.
36 *Ibid* at 71–72.
37 *Ibid* at 42, 47.
38 *Ibid* at 48–50.
39 *EARPGO*, *supra* note 2, s 6.
40 *Oldman River*, *supra* note 1 at 72.

of federal jurisdiction involved."[41] On this basis, the Supreme Court concluded that *EARPGO* cannot be used "as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power," and thus any intrusion into provincial matters would be merely incidental to the pith and substance of the legislation.[42] The Supreme Court's observation in this regard was critical, and Parliament's subsequent failure to heed the caution may be seen as underlying the constitutional vulnerability of subsequent iteration of EA legislation in the *IAA*.

Accordingly, *Oldman River* recognized a constitutional basis for federal EA legislation, but one that was considerate of the potential for impairment of areas of provincial jurisdiction. Nevertheless, the scope of federal EA was far from settled. The subsequent iteration of federal EA legislation remained subject to extensive litigation surrounding matters such as the limits of what aspects of an activity could or should be assessed to support valid federal decision-making.

IV. *CEAA 1992*

In 1990, as *Oldman River* made its way through the courts, the federal government tabled new EA legislation that would eventually become *CEAA 1992*. The bill passed into law in 1992 but did not come into force until 1995, following several revisions that generally expanded its application and enhanced its mandatory nature, and the development of key regulations.[43]

CEAA 1992 built on the concept of an affirmative regulatory duty articulated in *Oldman River* by implementing an explicit decision-based trigger. Section 5 required that an EA be conducted before any federal authority exercises or performs one of four enumerated duties or functions: (1) doing any act or thing that commits the federal authority to carrying out the project in whole or in part; (2) providing financial assistance to a project; (3) selling, leasing, or otherwise disposing of federal lands or any interest in those lands in a manner that would enable a project to be carried out; or (4) issuing a licence, permit, or approval or taking any other action that enabled the project to be carried out. The *Law List Regulations* provided a list of the provisions of federal statutes and regulations under which permits, licences, authorizations, or other forms of approval may be granted which would trigger application of section 5.[44] The *Exclusion List Regulations* specified classes of projects that were exempted from the application of *CEAA 1992* due to their minimal potential for significant adverse environmental effects.

In practice, a federal assessment would most often be triggered upon a proponent's application for federal authorizations in connection with a project. The need for authorization under the *Fisheries Act* to permit harmful impacts to fish habitat, or under *NWPA* to interfere with navigation, were common types of approvals that triggered the application of *CEAA 1992*.[45] A federal EA could be avoided entirely where the project

41 *Ibid*.
42 *Ibid*.
43 Gibson & Hanna, *supra* note 18 at 24–25; Northey, *supra* note 29 at 8–9; Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, ON: LexisNexis, 2008) at 10 [Doelle, *Federal Environmental Assessment*].
44 *Canadian Environmental Assessment Act*, SOR/94-636.
45 Doelle, *Federal Environmental Assessment*, *supra* note 41 at 120, 162.

could be designed and implemented in a manner that did not cause effects requiring federal authorization; for example, by undertaking physical activities in a manner that would not cause harmful alteration, disturbance, or destruction of fish habitat contrary to the *Fisheries Act*. In these cases, a proponent could seek a letter of advice from the responsible authority providing regulatory assurance that no contravention would occur if the project was carried out in accordance with terms set out in the letter.[46]

If triggered, *CEAA 1992* provided four process options of significantly different intensity, depending on a project's complexity and the likelihood of significant adverse environmental effects. Screening level assessments were required for any projects not otherwise designated by regulations and accounted for more than 99 percent of assessments conducted under *CEAA 1992*.[47] This process offered a high degree of flexibility, imposed relatively few mandatory requirements for public notice and participation, and could be streamlined through various class screening options to speed the processing of routine approvals. If the screening determined that significant adverse environmental effects were likely, or if there was uncertainty around such effects, the responsible authority was required to direct the project to the Minister of Environment for further referral either to mediation or to a review panel process. Large and complex projects belonging to any of the classes listed in the *Comprehensive Study Regulations* were directed to a more extensive and public comprehensive study process as a minimum level of assessment and could be further referred to mediation or panel review.[48] Mediation, in most cases, served a complementary function to one of the other process options.

Panel reviews were conducted by independent panels rather than responsible authorities, with key process decisions made by the Minister and a final decision subject to Cabinet approval. The panel review process was adaptable to co-operative joint review panels satisfying the EA requirements of other jurisdictions, such as provincial legislation. While *EARPGO* had provided generally that duplication of reviews with other environmental regulations was to be avoided, the process became increasingly formalized under *CEAA 1992*. The joint review process option was carried forward in all subsequent iterations of federal EA legislation.

Upon completion of one of the four assessment tracks, *CEAA 1992* formalized the basic decision-making framework developed under *EARPGO*. This required, in general terms, that a report be prepared summarizing the findings of the EA process, to be followed by a decision by either the responsible authority or the Minister as to whether the project was likely to cause "significant adverse environmental effects that cannot be justified in the circumstances."[49] Preventing "significant adverse environmental effects" was listed first among the purposes of *CEAA 1992* and featured prominently throughout information gathering processes.[50] No federal approval or authorization could be issued if a project was likely to cause significant adverse environmental effects and these could not be justified or

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46 Arlene J Kwasniak, "Slow on the Trigger: The Department of Fisheries and Oceans, the Fisheries Act and the Canadian Environmental Assessment Act" (2004) 27:2 Dal LJ 347.

47 R Jamie Herring, "The Canadian Federal EIA System" in Kevin S Hanna, ed, *Environmental Impact Assessment: Practice and Participation*, 2nd ed (Don Mills, ON: Oxford University Press, 2009) 281 at 285.

48 *CEAA 1992*, *supra* note 11, s 21; *Exclusion List Regulations, 2007*, SOR/2007-108.

49 *CEAA 1992*, *ibid*, s 37(1)(b).

50 *Ibid*, s 16.

sufficiently mitigated through conditions imposed through the approval or authorization.[51] However, that would not necessarily prohibit the project as a whole — only those aspects requiring a federal decision or approval would be prohibited. Where a decision-maker relied on mitigation measures to avoid or offset significant adverse environmental effects, *CEAA 1992* required that the responsible authority either ensure that the measures were implemented or be satisfied that another jurisdiction would ensure implementation.[52]

"Significant adverse environmental effects" was not defined in *CEAA 1992*. The definition of "environmental effect" in section 2 could conceivably extend to any change to the organic or inorganic matter in Canada and any effect of such change on, among other things, health, or socioeconomic conditions,[53] and "significance" permitted a large measure of opinion and judgment.[54] Further articulation of the standard for significant adverse effects fell largely to guidelines produced by the Canadian Environmental Assessment Agency.

V. "SCOPING TO TRIGGER"

While a "decision-based trigger" provided legal clarity on *CEAA 1992*'s application, the next question for most projects was what aspects of the project would be subject to a federal EA. Whether a project should be scoped narrowly around the specific physical activities requiring federal authorization, or broadly to consider the entire breadth of a proposed industrial development, would have significant implications for whether a screening assessment or a more intensive comprehensive study or panel review would be required, and for the range of mitigation measures that could be imposed as conditions on federal approvals.

Under section 15 of *CEAA 1992*, the responsible authority or, in the case of a mediation or review panel, the Minister had discretion to determine the scope of the project in relation to which an environmental assessment would be conducted. This discretion was subject to a poorly worded section 15(3), which required that an assessment of a physical work must include all undertakings "in relation to that physical work."[55] A trio of cases under *CEAA 1992*, directly considered whether this language enabled federal authorities to scope a project narrowly to assess only the physical works requiring federal permits or

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[51] *Ibid*, s 37(1)(b).

[52] *Ibid*, s 37(2).

[53] *Ibid*, s 2(1):

> [*E*]*nvironment* 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)
> …
> *environmental effect* means, in respect of a project,
> (a) any change the project may cause in the environment

[54] *Alberta Wilderness Association v Express Pipelines Ltd*, 1996 CanLII 12470 at para 9 (FCA):

> In addition, the principal criterion set by the statute is the 'significance' of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

[55] *CEAA 1992*, *supra* note 11, s 15(3).

authorizations. This approach, known as "scoping to trigger," became one of the most contentious and litigated parts of the *CEAA 1992* process.[56]

The trio, referenced here for the name of the project proponent, each concerned similar scoping decisions. In 1999, the Federal Court considered whether issuance of a *NWPA* approval for a bridge in Manitoba should require an assessment of the proposed road network and pulp mill the bridge was constructed to serve in *Manitoba's Future Forest Alliance v. Canada* (*Tolko*).[57] The same year, the Federal Court of Appeal in *Friends of the West Country Association v. Canada* (*Sunpine*)[58] considered an appeal of a similar decision to *Tolko*, this time in connection with a decision to scope the project under assessment to two bridges requiring permits under *NWPA*, excluding assessment of the broader forestry transportation network of which the bridges were a part, and the forestry operations the network was to serve. In its 2006 decision, in *Prairie Acid Rain Coalition v. Canada* (*TrueNorth*),[59] the appellate Court considered whether federal EAs conducted in connection with the Fort Hills Oil Sands Project could exclude consideration of the broader mining, bitumen extraction, terminal, and pipeline systems and be scoped to focus specifically on the destruction of a fish bearing creek, water management and erosion control, and removal of riparian vegetation triggering federal regulatory responsibilities under the *Fisheries Act*.

Each of these cases focused on the exercise of the responsible authority's discretion under section 15 of *CEAA 1992*. The impugned scoping decisions had been triggered by the proponent's application for construction of the specific bridge or alteration of a specific watercourse, not the broader forestry or bitumen mining operation. The requested relief would have required each responsible authority to *expand* the scope of the project (as put forward in the proponent's application) to include the broader operations to which it was related, on the premise that these would be undertakings in relation to the physical work within the meaning of section 15(3). In each case, the court found no error in the responsible authority's decision to limit the assessment to the specific physical work for which approval was required and activities directly related to the life cycle of that specific physical work, such as construction and operation of the specific bridge.

In *TrueNorth*, Justice of Appeal Rothstein (as he was then) considered specifically whether mine and pipeline construction, being activities listed in the *Comprehensive Study List Regulations*, must therefore be the project subjected to a federal assessment, rather than the proponent's more narrowly scoped application. Justice of Appeal Rothstein rejected this proposition in language echoing the constitutional considerations articulated by Justice LaForest in *Oldman River*, noting that the comprehensive study list

> [Does] not purport to sweep under a federal environmental assessment undertakings that are not subject to federal jurisdiction [and physical activities relating to their construction, operation, modification, and

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56 *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 [*Red Chris*]; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 132 [*Moses*].

57 *Manitoba's Future Forest Alliance v Canada (Minister of The Environment)*, 1999 CanLII 8362 (FC) [*Tolko*].

58 *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans) (CA)*, 1999 CanLII 9379 (FCA) [*Sunpine*].

59 *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans) (FCA)*, 2006 FCA 31 [*TrueNorth*].

> decommissioning]. Nor are the Regulations engaged because of some narrow ground of federal jurisdiction, in this case, subsection 35(2) of the *Fisheries Act*.[60]

Justice of Appeal Rothstein, writing in both *Sunpine* and *TrueNorth* on behalf of a unanimous Court, took specific note of the fact that the broader forestry operation and oil sands project in each case had been subject to provincial EA processes in which the federal government had participated extensively as an intervenor. Noting the *CEAA 1992* provisions for federal co-operation with provincial processes, Justice of Appeal Rothstein concluded in *TrueNorth*:

> The appellants may not be satisfied with a province conducting an environmental assessment, but the subject of the environment is not one within the exclusive legislative authority of the Parliament of Canada. Constitutional limitations must be respected and that is what has occurred in this case.[61]

Leave to appeal the decision to the Supreme Court of Canada was dismissed.[62]

Four years after *TrueNorth*, Justice Rothstein, now writing on behalf of a unanimous Supreme Court of Canada, considered a significantly narrower project scoping issue. *MiningWatch Canada v. Canada* (*Red Chris*)[63] originated in the Department of Fisheries and Oceans' (DFO) decision to change the review track for a proposed open mining and milling operation in northern British Columbia from a comprehensive study to a screening decision. Unlike the earlier cases, the project description submitted to the DFO had consisted of the entire mining and milling operation, which was among the classes of projects on the comprehensive study list. In downgrading the assessment to a screening, the DFO had made the decision to narrow the project scope to the tailings impoundment area and associated water works requiring federal approval, which the DFO granted summarily based on information collected in an already completed provincial EA process in which the DFO had participated. As Justice Rothstein noted,[64] the appellant environmental non-governmental organization made a strategic decision not to challenge the substantive scoping decision, but instead focused the appeal on whether the DFO erred by directing review to a screening assessment contrary to section 21 of *CEAA 1992*. Section 21 had been amended after *TrueNorth* was decided to require that any project listed in the *Comprehensive Study List Regulations* undergo "public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment,"[65] and permitted only a comprehensive study, mediator, or review panel track for such a project's assessment. Accordingly, *Red Chris* focused narrowly on the application of the amended section 21.

The Federal Court of Appeal below had relied heavily on *Sunpine* and *TrueNorth* in finding that the DFO had discretion to determine the scope of a "project" generally, including for the purposes of section 21. Justice Rothstein overturned the lower court's decision, finding that this would defeat the purposes of the amended section 21. Acknowledging departure from his previous decisions to the extent these might be

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60 *Ibid* at para 24.
61 *Ibid* at para 26.
62 *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 CanLII 24423 (SCC).
63 *Red Chris*, *supra* note 56.
64 *Ibid* at para 50.
65 *Ibid* at para 19.

interpreted as finding plenary discretion for federal authorities to determine project scope, Justice Rothstein described a general presumption that the term "project" in the context of section 21 (and the related section 18) would be the project as proposed by the proponent, which could be expanded, but not narrowed, as required by the facts and circumstances of the project.[66]

Red Chris, in conjunction with the Supreme Court's contemporary decision in *Quebec (AG) v. Moses*,[67] has been viewed by some as overturning *Sunpine* and *TrueNorth* and endorsing federal EA of resource projects in their entirety, rather than simply those aspects or components requiring federal funding or regulatory approval.[68] In our view, reading *Red Chris* in this manner overlooks its narrow focus on statutory interpretation and the conspicuous absence of commentary on constitutional issues. *Red Chris* was never certified as a constitutional question. Justice Rothstein was careful to note that a responsible authority or Minister could and should avoid duplication of provincial assessments by using coordination mechanisms provided in *CEAA 1992*.[69] The Supreme Court declined to set aside the DFO's scoping decision, noting that the case had been brought as a test case for the new section 21, that the substantive outcome was not in question, and that substantive relief would unfairly prejudice the mine's proponent. The scope of discretion under section 15 was never directly at issue, and the Supreme Court's finding that a "project" should be presumptively scoped according to the proponent's project description was consistent with prior decisions in *Sunpine* and *TrueNorth*, both of which affirmed a responsible authority's discretion to *confine* assessment to the proponent's project applications.

Following *Red Chris,* section 21 was amended to remove language concerning public consultation in scoping projects on the comprehensive study list, such that projects on the list were no longer automatically directed to a comprehensive study.[70] Further litigation on the crucial issue of scoping to trigger, and its constitutional implications for the permissible scope of federal assessments triggered only by an effect on fish, navigable waters, or a similar area of federal regulation — a question that had never been fully addressed in *Oldman River* — would never occur, because *CEAA 1992* and its scoping requirements would be repealed two years later and replaced by *CEAA 2012*.

VI. *CEAA 2012*

Beyond the litigation risk attending project scope determinations, *CEAA 1992* caused significant frustrations for project proponents for several reasons. Thousands of screening decisions were triggered annually for inconsequential activities requiring routine federal approval. For projects requiring comprehensive studies or panel reviews, timelines for reviews under *CEAA 1992* were set on a project-by-project basis with no time limit for a

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66 *Ibid* at para 34.

67 *Moses*, *supra* note 56.

68 Marie-Ann Bowden & Martin Z P Olszynski, "Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment," Case Comment (2010), 89 Can Bar Rev 445; Meinhard Doelle, "The Implications of the SCC Red Chris Decision for EA in Canada" (2010) 20 J Envtl L & Prac 161 at 162; Shaun Fluker "MiningWatch Canada v Canada (Fisheries and Oceans): Hoisted on One's Own Petard?" (2010) 20 J Envtl L & Prac 151.

69 *Red Chris*, *supra* note 56 at para 41.

70 *Jobs and Economic Growth Act*, SC 2010, c 12, s 2156.

decision, and federal EAs routinely stretched into multi-year exercises with unpredictable results, increasing expenses and industry frustration.[71] Long delays, contentious hearings, and subsequent litigation led to the view that federal assessments were being used by special interest groups to delay or prevent projects without meaningfully contributing to better environmental or socio-economic outcomes. Attempts to add efficiency to the system had limited success, and provincial EAs continued to offer demonstrably shorter timelines for assessment and approval of similarly scaled projects.[72]

Reform of *CEAA 1992* became a central policy of the new Stephen Harper government, first elected in 2006 on a platform of reducing regulatory burden and increasing economic competitiveness.[73] The new government first introduced a series of amendments to *CEAA 1992* through its 2010 Budget Implementation Bill, narrowing the scope of projects to be assessed, reducing the number of projects triggered by *CEAA 1992*, and exempting certain federal infrastructure projects from federal EA.[74] In March 2012, the now majority government introduced draft legislation of what would become *CEAA 2012* through Bill C-38, an omnibus bill implementing the federal budget.[75] The bill passed into law in June of 2012 with no amendments to the draft EA legislation.[76]

CEAA 2012 introduced significant changes intended to streamline federal assessments and reduce duplication with provincial processes, largely implementing 20 recommendations made by the Cabinet appointed Standing Committee on the Environment during its statutory seven-year review of *CEAA 1992* early in the same year.[77] The new *CEAA 2012* included expanded substitution and equivalency provisions allowing the federal review agency to accept an overlapping provincial EA and base approval decisions on the findings of the provincial process. It carried forward the government's 2010 amendments to *CEAA 1992* restricting public participation to "interested parties," a term which included a person "directly affected" by the project or having "relevant information or expertise."[78] It introduced legislated time limits for the completion of assessments.[79] It also significantly narrowed the scope and content of environmental effects to be assessed under the legislation to effects on matters stated to be of federal jurisdiction.[80]

Of specific consequence to this discussion, *CEAA 2012* introduced an entirely new federal EA framework built substantially around the comprehensive study list from *CEAA 1992*. Among the Standing Committee recommendations to improve efficiency was to

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71 Carol Hunsberger, Sarah Froese & George Hoberg, "Toward 'Good Process' in Regulatory Reviews: Is Canada's New System Any Better Than the Old?" (2020) 82 Envtl Impact Assessment Rev 106379 at 7.

72 Kurtis Reed et al, "Timing of Canadian Project Approvals: A Survey of Major Projects" (2016) 54:2 Alta L Rev 311.

73 See e.g. Department of Finance, *Canada's Economic Action Plan: Budget 2009*, Catalogue No F1-23/2009-3E (Ottawa: Department of Finance, 2009) at 140.

74 *An Act to Implement Certain Provisions of The Budget Tabled in Parliament on March 4, 2010 and Other Measures*, SC 2010, c 12.

75 *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

76 *Ibid*.

77 House of Commons, *Statutory Review of the Canadian Environmental Assessment Act*: *Protecting the Environment, Managing Our Resources: Report of the Standing Committee on Environment and Sustainable Development* (March 2012) (Chair: Mark Warawa) at 30–32.

78 *CEAA 2012*, *supra* note 12, s 2(2).

79 *Ibid*, s 27(2).

80 *Ibid*, s 5.

eliminate screening decisions by ensuring "that assessments under the Act are triggered via a project list instead of the current 'all in unless excluded' approach taken by the Act."[81] *CEAA 2012* implemented that recommendation by making key provisions of the act applicable only to "designated projects," a defined term that applied to any physical activities belonging to one of the classes of projects listed in the *Regulations Designating Physical Activities* (Project List), or designated by the Minister under section 14(2).[82] The Project List largely replicated the classes designated on the earlier comprehensive study list. But where the comprehensive study list had only determined the assessment track applicable to projects that were already subject to *CEAA 1992* due to the requirement for federal approvals or authorizations, the Project List now triggered an environmental assessment of an entire project belonging to one of the listed classes — whether or not an affirmative regulatory duty under federal legislation existed. This change from a decision-based trigger to a project-based trigger would have significant constitutional implications, as discussed below.

Because only those projects that had required a comprehensive assessment under *CEAA 1992* now triggered the new *CEAA 2012*, the new triggering mechanism had the immediate effect of excluding the 99 percent of projects that had formerly triggered only screening-level assessments. This reduced the number of assessments from several thousand annually to a few dozen within the first years of the *CEAA 2012* coming into force.[83] Scoping to trigger became a non-issue, as only those projects that would have required a comprehensive study or panel review under *CEAA 1992* were now subject to assessment. Under *CEAA 2012*, a review would be conducted either as a "standard" review resembling the former comprehensive study process or as a panel review (including a joint panel with other jurisdictions). "Screening" decisions were pared down to a decision on whether a project should be exempted from federal EA despite its inclusion on the Project List, thus removing the scoping decisions, public engagement, and follow-up measures that had been part of screening decisions under *CEAA 1992*.[84] Criticism (as well as enthusiasm) for *CEAA 2012* tended to focus on these immediate practical effects.[85]

On a structural level, however, the new project-based trigger required that federal EA legislation take on the characteristics of a substantive regulatory regime. Section 6 of *CEAA 2012* established a stand-alone prohibition preventing a proponent from doing any act or thing in connection with carrying out a designated project if that act or thing may cause an "environmental effect" — until and unless the Canadian Environmental Assessment Agency decided that no EA was required, or the proponent complied with the conditions

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81 House of Commons, *supra* note 70 at 16.

82 *Regulations Designating Physical Activities*, SOR/2012-147.

83 Arlene Kwasniak, "Federal Environmental Assessment Re-Envisioned to Regain Public Trust: The Expert Panel Report" (12 April 2017), online (blog): [perma.cc/78C3-GBSZ] ("[a]lthough numbers varied, several thousand federal EAs were triggered annually under *CEAA 1992* … in 2014 there were only 23 EAs").

84 Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 3rd ed (Toronto: Carswell, 2019) at 600.

85 Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012) 24 J Envtl L & Prac 1 [Doelle, "CEAA 2012"]; Robert B Gibson, "In Full Retreat: The Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 Impact Assessment & Project Appraisal 179 [Gibson, "In Full Retreat"]; Jocelyn Stacey, "The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy" (2016) 21:2 Rev Const Stud 165.

in a decision statement issued following the EA. This prohibition was backed by significant penalties and enforcement powers under sections 90 to 102. By contrast, the former *CEAA 1992*, like its predecessor in *EARPGO*, contained no prohibitions or penalties applicable to proponents, relying instead on regulation under other federal legislation to ensure compliance, such as the *Fisheries Act* prohibition against harmful alteration, disturbance, or destruction of fish habitat.

CEAA 2012 also centralized regulatory decision-making among three agencies: the National Energy Board or Canadian Nuclear Safety Commission, which acted as the responsible authority on projects falling within their respective competencies, and the Canadian Environmental Assessment Agency, which acted as the responsible authority for all other assessments, replacing the various agencies and ministries that had formerly acted as responsible authorities under *CEAA 1992*. All federal agencies continued to be prohibited under section 8 of *CEAA 2012* from authorizing activities subject to the Act unless an EA had been conducted or waived in accordance with the Act, but for private projects, this was now of secondary importance to the prohibitions and penalties directly applicable to the proponent under section 6.

The application of *CEAA 2012* to designated projects created, at least in theory, the possibility that a project with no direct connection to federal jurisdiction could trigger a federal EA based solely on its inclusion on the Project List or designation at the Minister's discretion under section 14(2), without any affirmative regulatory duty on the part of the federal government and thus no clear link to federal jurisdiction. While in retrospect it is clear that *CEAA 2012* opened the gate to the constitutional Trojan Horse warned of in *Oldman River*, several features concealed or blunted the force of this new reality.

First, *CEAA 2012* took provincial co-operation to a new and mandatory level by requiring the Minister to approve substitution of the federal EA process with an equivalent provincial process, subject only to conditions intended to ensure that the substituted process "would be an appropriate substitute."[86] Second, qualifying language in section 6 itself specified that acts taken in connection with a designated project would be prohibited only "if that act or thing may cause an environmental effect referred to in section 5(1)."[87] An "environmental effect" was limited to a list of changes enumerated in section 5, each with at least a superficial link to areas of federal jurisdiction or existing federal laws, through a connection to extra-provincial effects or changes on federal lands, fish and fish habitat, migratory birds, endangered species, and Aboriginal peoples.[88] Third, the definition of environmental effects significantly constrained the Minister's discretionary designations under section 14(2) and the factors to be considered in screening decisions and environmental assessments, [89] and it was central to the *CEAA 2012* decision-making framework.

The final decision under *CEAA 2012* to allow or prohibit a designated project from proceeding required the relevant decision-maker to determine first whether the project is

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[86] *CEAA 2012*, *supra* note 12, s 32.

[87] *Ibid*, s 6.

[88] The Supreme Court of Canada would later observe, in considering very similar language under the *IAA*, that these self-defined federal effects "overshoot Parliament's legislative authority" (*IAA Reference* SCC, *supra* note 4 at para 196).

[89] *CEAA 2012*, *supra* note 12, s 14(2).

likely to cause significant adverse effects. Only if significant adverse environmental effects were found to be likely would the project be referred to the Governor in Council (namely, federal Cabinet) to decide whether the adverse environmental effects were justified in the circumstances.[90] This process formally separated identifying and gathering information about environmental effects from the political decision of justifying those impacts in the circumstances and ultimately approving the project. Precedents and experience built under the predecessors to *CEAA 2012*, which also focused the assessment on significant adverse environmental effects, added some measure of clarity and predictability to what would be assessed on the adverse side of this cost-benefit analysis.[91]

The *vires* of *CEAA 2012* was never challenged. Yet litigation, delay, and uncertainty in federal environmental assessment continued under *CEAA 2012*, with a prime example being the unprecedented number of legal challenges to the Trans Mountain Expansion Project (TMX).[92] Based on an initial application in 2013, the contentious interprovincial pipeline was assessed under *CEAA 2012* and received approval three years later, in November 2016, only to have that approval quashed by the Federal Court of Appeal in August 2018 for the federal government having failed to sufficiently consult with Indigenous groups, and for the National Energy Board having failed to adequately assess the impact of increased tanker traffic and consider effects on marine mammals.[93] Following further consultations to address these flaws, the Governor in Council approved TMX with new conditions in June 2019. That approval was also challenged unsuccessfully at the Federal Court of Appeal for an alleged failure to consult with Indigenous groups and remained in question until the Supreme Court of Canada ultimately refused leave to appeal in July 2020.[94] Despite being acquired by the federal government in 2018, the project faced sustained opposition from municipalities, activist groups, Indigenous groups, and the government of British Columbia, and would not be completed until spring of 2024, more than a decade after initiating environmental assessment.

VII. THE *IMPACT ASSESSMENT ACT*

While *CEAA 2012* received some recognition for increasing efficiency and predictability for proponents,[95] it was fiercely criticized in academic literature as "a major step backward,"[96] a "comprehensive and dramatic" retreat from best practices,[97] and "an attempt to exempt environmental decision-making from the … rule of law."[98] These critics tended to view *CEAA 2012* as having eroded public confidence in federal EA processes, contributing to legal and political quandaries like those facing TMX.

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90 *Ibid* at ch 19, ss 52, 31(1).

91 Northey, *supra* note 29 at topic 3a.

92 Bridget Gilbride & Niall Rand, "Chronicling the Trans Mountain Expansion Project's Path to Legal Certainty" (13 July 2020), online (blog): [perma.cc/UT7J-EHNQ].

93 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, leave to appeal to the SCC refused, 38379 (2 May 2019).

94 *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, leave to appeal to the SCC refused, 39111 (2 July 2020).

95 Hunsberger, Froese & Hoberg, *supra* note 71.

96 Doelle, "CEAA 2012," *supra* note 85 at 17.

97 Gibson, "In Full Retreat," *supra* note 85 at 180.

98 Stacey, *supra* note 85 at 179. For a more detailed comparative assessment of *CEAA* 1992, *CEAA* 2012, and the *IAA* against "good process" criteria, see Hunsberger, Froese & Hoberg, *supra* note 71.

In 2015, less than three years after *CEAA 2012* came into force, a new Liberal majority government found electoral success on a campaign that included "restore[ing] lost protections" to federal EA legislation.[99] In August 2016, a four-person Expert Panel was appointed to "review Canada's environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes."[100] The Expert Panel report, *Building Common Ground: A New Vision for Impact Assessment in Canada*,[101] was released after a year of public engagement and recommended a complete replacement of the *CEAA 2012* regime. Among the proposed reforms were timelier decisions, reduced uncertainty, and a "one project, one assessment" approach, earning cautious support from industry. That support dissipated as details about the proposed reforms emerged in a white paper released in June of 2017. The draft legislation was tabled in February 2018 as Bill C-69 proposed a greatly expanded "impact assessment" regime, which accompanied an overhaul of the *National Energy Board Act*. Bill C-69 underwent strenuous debate in Parliament resulting in an unprecedented 188 proposed amendments stemming from an extensive Senate review, roughly half of which were accepted by the House of Commons, before coming into force on 28 August 2019.[102]

Jurisdictional concerns were not initially the focus of the pointed opposition to Bill C-69 from industry and resource producing provinces. Criticism was directed mainly at expanded procedural requirements expected to stall or kill major projects, such as interprovincial pipelines — as suggested by one popular epithet for the new legislation: the "No More Pipelines Act." These procedural changes included a new early planning phase providing for public review and participation in advance of the formal impact assessment process. The *IAA* expanded public review and participation requirements generally, with no restrictions on standing, and emphasized reconciliation with Indigenous Peoples throughout its substantive procedural requirements and decision-making factors. The list of factors to be considered during impact assessment also expanded dramatically from a focus mainly on environmental effects and their significance to 20 mandatory factors for consideration, including the project's contributions or hindrance of Canada's ability to meet its climate change commitments, the extent to which the project contributes to sustainability, and any other matter that the Impact Assessment Agency deemed relevant. Although the *IAA* imposed legislated time limits for planning, impact assessment, and decision-making phases which were comparable to *CEAA 2012*, these limits could be extended indefinitely by up to 90 days at a time, without requiring reasons for the extension to be provided.[103]

With the exception, perhaps, of a new public interest decision-making structure (discussed below), the extent to which these changes materially changed the likely outcomes for federal EA for major infrastructure projects is debatable, as many features

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99 Liberal Party of Canada, *A New Plan for a Strong Middle Class* (Ottawa: Liberal Party of Canada, 2015) at 41–42.

100 Government of Canada, "Review of Environmental Assessment Processes: Expert Panel Terms of Reference," online: [perma.cc/D2D6-E2LV].

101 Environmental Assessment Review Expert Panel, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Canadian Environmental Assessment Agency, 2017).

102 Rod Northey, *A Guide to Canada's Impact Assessment Act* (Toronto: LexisNexis, 2023) (loose-leaf 2023 supplement) at §1.01, 3(d).

103 Notably, the *IAA* shortened the timelines during the assessment phase as compared to *CEAA 2012*. In particular, the *IAA* limited an Agency-led assessment to 300 days and a review panel-led assessment to 600 days, as compared to 365 days and 24 months under *CEAA 2012*, respectively.

introduced in the new legislation simply formalized processes and standards imposed under previous legislation through policy, or administrative discretion, or as a result of litigation by Indigenous and special interest groups.[104] Fundamentally, the *IAA* carries forward the substantive regulatory regime introduced by *CEAA 2012*, with its application to "designated projects" identified in a Project List or at the Minister's discretion effectively unchanged. In the current legislation, section 7 of the *IAA* largely mirrors the *CEAA 2012* section 6 prohibition, preventing a proponent from carrying out actions in connection with a designated project that may cause any of the changes largely copied from the list of "environmental effects" under section 5 of *CEAA 2012*. However, and fundamentally, unlike under *CEAA 2012*, there is no requirement that the effects (now called "impacts" under the *IAA*) be "adverse" or significant for the prohibition to apply. Any change to, for example, the social or economic conditions of the Indigenous peoples of Canada or to fish or fish habitat would conceivably fall within this prohibition, effectively prohibiting any physical activity in connection with a designated project unless authorized or exempted according to the *IAA*. As was also the case under *CEAA 2012*, contravention is an offence punishable by substantial fines for each day the offence continues.[105]

Under the *IAA*, the Project List continues as the *Physical Activities Regulations*, featuring classes of physical activities carried forward with incremental changes from the *CEAA 2012* Project List and the earlier *Comprehensive Study Regulations*.[106] One notable exception is the inclusion of new in situ oil sands facilities or expansions of the same above certain capacity thresholds — a class of entirely intra-provincial projects whose primary link to a purported area of federal concern was through increased greenhouse gas emissions. An example of said federal overreach is featured prominently in the Supreme Court's decision in the *IAA Reference*.

The Minister's discretion to designate projects not on the Project List also continues under section 9.[107] Where an EA is required following the expanded planning phase and screening decision, the *IAA* offers process options similar to those used under *CEAA 2012*; specifically a standard, agency-led assessment, a panel review, and, with the co-operation of other jurisdictions, a joint panel review, depending on the potential for "adverse effects on areas of federal jurisdiction," public concern, opportunities for collaboration with other jurisdictions, and any impact on the rights of Indigenous peoples.

For all of these essential similarities to *CEAA 2012*, the *IAA* did introduce one significant structural change in its final decision-making framework. As described above, earlier iterations of federal EA legislation, from *EARPGO* to *CEAA 2012*, had based key decisions on whether the project was likely to cause significant adverse environmental effects. *CEAA 2012* formalized this process by defining environmental effects through a list in section 5 of that Act. A political decision by Cabinet as to whether the effects were justified in the circumstances would follow only if it was likely that these specific effects would occur, and that they would be both significant and adverse. Under the *IAA*, the ultimate decision as to whether a project should be allowed to proceed and under what

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[104] David V Wright, "The New Federal *Impact Assessment Act*: Implications for Canadian Energy Projects" (2021) 59:1 Alta L Rev 67.

[105] *IAA*, *supra* note 3, ss 144(1)(a), 144(3), 146(1).

[106] *Physical Activities Regulations*, SOR/2019-285; *Comprehensive Study List Regulations*, SOR/94-638.

[107] *Ibid*, s 9.

conditions becomes a single determination by the Minister (in the case of a standard agency assessment) or Cabinet (in the case of a panel review): whether "adverse effects within federal jurisdiction" and "adverse direct or incidental effects" (defined as effects related to a specific federal authorization required for the designated project) are in the public interest. The decision must take into account six factors enumerated in section 63, including the extent to which the project contributes to sustainability and to Canada's ability to meet its climate change commitments.

The legal effect of this new public interest decision-making framework is to greatly expand the cost-benefit analysis by which a project can be approved or denied. Formerly, *CEAA 2012* weighed significant adverse environmental effects within the scope of section 5 against any number of positive effects that may justify the project, such as job creation and revenues. This structure faced criticism for its apparently lopsided decision-making ledger and its confinement to a restricted range of environmental components at the expense of cumulative or ecosystem effects.[108] Under the *IAA*, a decision-maker can effectively balance any adverse or incidental effects against any salutary effects when determining whether the project was ultimately in the public interest, including effects not linked to an area of federal jurisdiction. While this public interest test gestures toward the holistic decision-making process advocated as an element of "next generation environmental assessment,"[109] determining an undefined "public interest" remains highly subjective and political, to the disappointment of many who hoped for clear requirements and a more predictable process. Deployed in the context of a substantive regulatory regime which may apply to any class or project designated by the federal Minister, this largely unbounded decision-making framework would prove fatal to the constitutionality of the *IAA* in the Supreme Court majority's opinion during the *IAA Reference*.

VIII. *REFERENCE RE IMPACT ASSESSMENT ACT*

Within weeks of the *IAA* coming into force, the province of Alberta issued an order in council under section 26 of the *Judicature Act* referring two constitutional questions to the Court of Appeal of Alberta: (1) whether the *IAA* is unconstitutional in whole or in part; and (2) whether certain regulations made under the *IAA* are unconstitutional in whole or in part. The case was argued before the Court of Appeal of Alberta in February of 2021. On 10 May 2022, the Court of Appeal released a 765-paragraph opinion, with a four-to-one majority finding the *IAA* a "classic example of legislative creep" and answering both questions in the affirmative — the *IAA* and the regulations were unconstitutional in their entirety.[110]

Canada appealed as of right and the matter was heard before the Supreme Court of Canada in March of 2023. In a five-to-two opinion (released somewhat ominously on Friday, the thirteenth of October, 2023) written by the Chief Justice, the majority (Chief Justice Wagner, Justices Côté, Rowe, Martin, Kasirer concurring) affirmed the lower Court's opinion, finding the *IAA* unconstitutional except for a discrete portion set forth in

[108] Gibson, "In Full Retreat," *supra* note 85 at 183–84.

[109] Robert B Gibson, Meinhard Doelle & A John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 J Envtl L & Prac 251.

[110] *IAA Reference* ABCA, *supra* note 8 at paras 10, 21.

sections 81 to 91. That portion applies solely to projects carried out on federal lands or outside of Canada and was never seriously contested before either court.

Notably, Canada did not advance arguments that the remaining designated projects scheme, which relied on prohibitions against proceeding with designated projects backed by penalties, was a valid exercise of federal criminal law power under section 91(27) of the *Constitution Act, 1867*. Nor did Canada argue that the scheme fell within Parliament's residual power under section 91 to enact laws for the peace, order, and good governance of Canada.[111] Canada instead sought to characterize the regime in a manner that hearkened to the *EARPGO* scheme considered in *Oldman River*, as being in part a statute enacted "to safeguard against adverse environmental effects in relation to matters within federal jurisdiction under the *Constitution Act, 1867*," in combination with regulations (the Project List) enacted to "identify projects with the greatest potential for adverse federal effects for the purpose of determining whether an impact assessment is warranted."[112]

Canada relied heavily on *Oldman River* to support its position that this regime was intra vires the multiple federal matters it ostensibly protected from adverse environmental effects. Yet as the preceding discussion has shown, the *IAA* had changed fundamentally from the procedural and ancillary legislation considered in *Oldman River*. The majority at the Supreme Court of Canada found that the designated projects regime under the *IAA* is in pith and substance a discrete regime intended "to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts."[113] Chief Justice Wagner, writing for the majority, dismissed Canada's characterization, explaining that the scheme exceeded federal jurisdiction 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.[114]

These deficiencies were found to be particularly problematic in connection with screening decisions and the final public interest decision and resulting regulation and oversight.

With respect to screening decisions, which the majority found critical to funneling the scheme's broad designation mechanism,[115] the *IAA* requires consideration of an open-ended list of factors, all of seemingly equal importance. Only two factors were found to relate to federal jurisdiction, and one of these relies on the self-defined "effects within federal jurisdiction" which the majority found to be overbroad.[116] This insufficient focus

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111 Canada did rely on peace, order, and good governance to support discrete aspects of the scheme (*IAA Reference* SCC, *supra* note 4 (Factum of the Appellant at paras 120, 136)).

112 *Ibid* at para 4.

113 *IAA Reference* SCC, *supra* note 4 at para 109.

114 *Ibid* at para 6.

115 *Ibid* at para 150.

116 *Ibid* at para 151. The majority refers to sections 16(2)(b) and (c), which respectively require the agency to take into account "the possibility that the carrying out of the designated project may cause adverse

on federal impacts allows an impact assessment to be ordered for reasons other than the project's possible impacts on federal jurisdiction.[117]

With respect to the public interest decision, which the majority found lies "at the heart of this scheme,"[118] the mandatory section 63 decision-making factors include matters outside of clear federal jurisdiction. The majority's reasons make clear that the adverse effects of a project on Canada's climate change commitments or on sustainability broadly are not substantive areas of federal jurisdiction.[119] As the majority states:

> 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.[120]

Because these factors are framed in relation to the assessment of the project as a whole, decision-making is transformed into a determination of whether the project as a whole is in the public interest. This grants a 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."[121] The majority's conclusions in this regard echo the cautions raised by Justice LaForest in *Oldman River* 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."[122]

In addressing these deficiencies, the majority provided a clear nudge toward a return to the two-part "environmental effects" decision-making framework under *CEAA 2012*, which it described as follows:

> [U]nder 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*.[123]

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effects within federal jurisdiction or adverse direct or incidental 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*" (*ibid* at para 310).

117 *Ibid* at paras 150–51.

118 *Ibid* at para 162.

119 *Ibid* at para 178.

120 *Ibid* at para 169 [emphasis in original].

121 *Ibid* at para 178.

122 *Ibid* at para 176 [citations omitted].

123 *Ibid* at para 175 [emphasis added].

As described by the majority, this framework creates a "ledger" in which adverse effects validly within federal jurisdiction identified in the EA process are weighed against the needs and benefits of the activity which may justify those effects in the circumstances.[124] There are multiple interpretations possible as to exactly what range of positive or negative effects can and should constitutionally be weighed on each side of a federal cost-benefit decision-making ledger.[125] However, in our view, the majority's reasons support the view that there will be jurisdictional limits on the adverse effects that could constitutionally support the application of the *IAA*'s section 7 prohibition, but that Cabinet at its discretion can consider a range of positive effects to stack up as public interest justifications (subject to common law standards of reasonableness).

While the reasons do not prescribe specific solutions to the *IAA*'s deficiencies, Chief Justice Wagner's reasons make clear that a federal impact assessment scheme must be "consistently focused on federal matters," that final decision-making "does not veer towards regulating the project qua project or evaluating the wisdom of proceeding with the project as a whole," and that the effects regulated by the scheme must align with federal legislative competence.[126]

IX. PROPOSED AMENDMENTS TO THE *IAA*

As a reference opinion, the Supreme Court's *IAA Reference* decision does not strike down the legislation;[127] however, in accordance with conventions, the Federal government committed to revising the legislation to comply with the Supreme Court's opinion. As this article goes to publication, 32 draft amendments have been released as part of omnibus legislation implementing the 2024 federal budget,[128] with the stated intention of ensuring the *IAA* is constitutionally sound.[129] It is anticipated that the amendments may be implemented as early as June 2024.

The amendments, if implemented in their present form, would not materially alter the essential procedures, timelines, and authorities in the *IAA*, although the amendments would create an expanded role for agreements with provinces and other jurisdictions for the purposes of coordinating environmental assessments and remove the mandatory requirement for proponents to submit a detailed project description (which is used to inform a screening decision following an initial planning phase), permitting the agency discretion where it is of the opinion that a screening decision can be made without a formal project description. The most material amendments, however, relate to the definition of "effects

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124 *Ibid* at para 174.

125 Nathan Murray & Martin Olszynski, "Locating the Constitutional Guardrails on Federal Environmental Decision Making after *Reference re: Impact Assessment Act*" (30 January 2024), online (blog): [perma.cc/48PN-4MPL].

126 *IAA Reference* SCC, *supra* note 4 at para 206.

127 *Ontario (AG) v Canada (AG)*, [1912] AC 571, cited in Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 2021 Student Ed (Toronto: Thomson Reuters Canada, 2021) at 302; *Bedford v Canada (AG)*, 2013 SCC 72 at para 40.

128 *An Act to Implement Certain Provisions of The Budget Tabled in Parliament on April 16, 2024*, SC 2024, c 17 [*Bill C-69*].

129 Canada, Department of Finance, *Budget 2024: Fairness for Every Generation*, Catalogue No 1719-7740 (Ottawa: DFO, 2024) at 191–93.

within federal jurisdiction," which would be replaced by a new definition for "adverse effects within federal jurisdiction." This revision introduces two notable changes.

First, the revised definition would apply to "non-negligible adverse" changes, as compared to the current definition which could include *any* change, positive or negative, to, for example, fish or fish habitat or to the lives of Indigenous peoples. Similar amendments would apply to the related definition of "direct or incidental adverse effects," which captures effects that have a connection to federal decision-making, authorization, or assistance. The amendment would continue to create significant uncertainty, since it is unclear what would constitute a "non-negligible" adverse change, or how such a determination would be made. A serious question remains as to whether the breadth of the proposed definition of "adverse effects within federal jurisdiction" would be sufficiently constrained to be constitutionally valid.

Second, the amendments would remove the existing definition's broad application to any type of extra-provincial effects resulting from a designated project, limiting consideration of extra-provincial effects (other than effects occurring on federal lands), to non-negligible adverse changes that are caused by pollution that affects boundary waters, international waters, interprovincial waters, or the marine environment outside of Canada. This narrowed focus on extra-provincial water pollution would appear to rely on the Supreme Court's findings of federal jurisdiction over marine pollution in *R. v. Crown Zellerbach*, and pollution of interprovincial rivers in *Interprovincial Co-operatives Ltd. v. The Queen*, although it is unclear whether the broad scope of the defined jurisdiction aligns with the jurisdiction described in the Supreme Court's reasons in those cases.[130] The new definition would also create what is effectively a second definition applicable to projects that are carried out on federal lands or federal works or undertakings as defined in the *Canadian Environmental Protection Act, 1999*,[131] which the Supreme Court majority's opinion in the *IAA Reference* found appropriately within federal jurisdiction to regulate in their entirety. For such projects, "adverse effects within federal jurisdiction" would include *any* kind of non-negligible adverse change or effect.

Additional amendments would seek to tether key aspects of the *IAA* to this revised definition. First, the amended definition would govern the applicability of the section 7 prohibition against proceeding with any project that may cause adverse effects within federal jurisdiction. Second, screening decisions would require that a project undergo further assessment only if the Impact Assessment Agency is satisfied that carrying out the designated project may cause adverse effects within federal jurisdiction or direct or incidental adverse effects. Third, the existing public interest determination by the Governor in Council or Minister would be replaced by a process that recalls, to a degree, the two-step process under *CEAA 2012*. A decision-maker must first determine whether, after taking into account mitigation measures, the adverse effects within federal jurisdiction and the direct or incidental adverse effects described in the impact assessment report are "likely to be, to some extent, significant and, if so, the extent to which those effects are significant."[132] These awkwardly worded amendments introduce further uncertainty into

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130 *R v Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC); *Interprovincial Co-operatives Ltd v R*, 1975 CanLII 212 (SCC).

131 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 3(1).

132 *Bill C-69*, *supra* note 128 at ss 60(1)(a), 61(1)(a), 62(1)(a).

the basis upon which decisions are made. If "to some extent" significant effects are identified, the decision-maker must then determine whether these effects are "justified in the public interest" in light of the extent of their significance and the factors listed in section 63. These factors would remain largely the same as the current version, although reorganized and with revised language that purports to focus decision-making more on the effects of a project rather than as an assessment of the project itself.[133]

To use the federal Minister's terminology shortly after the release of the Supreme Court's *IAA Reference* decision, these amendments are "relatively surgical."[134] The amended *IAA* would remain a substantive regulatory regime triggered by a project's inclusion on the project list, constrained only by the extent of self-defined "adverse effects within federal jurisdiction." Notably, this definition relies heavily on the phrase "non-negligible," which is not defined in the proposed amendments. It remains unclear whether merely "non-negligible" impacts, as opposed to the "significant adverse effects" contemplated in *CEAA 2012*, provide meaningful guardrails. Federal decision-makers may continue to apply the revised *IAA* as a substantive regime to regulate wholly intra-provincial projects that have minor, but non-negligible, effects on federally regulated aspects of the environment. Similarly, the expanded opportunities to consider whether there are adequate EA processes under provincial or other jurisdictions (including First Nations and other federal agencies), and to co-operate in those procedures, are meaningful only if the Agency or Minister chooses to engage them.

Arguably, an intra-provincial designated project that causes only negligible adverse effects within federal jurisdiction would not be subject to the section 7 prohibition and should be screened out of a federal impact assessment. However, if this apparently low threshold is triggered — for example, by an effect on migratory bird habitat caused during construction — then the entire project may be subjected to a lengthy federal EA process that considers the full range of factors enumerated under section 22, going far beyond the specific federal impacts and potentially leading to delays which, from a proponent's perspective, may have greater consequences than the ultimate approval decision. Assuming the assessment finds that any adverse effects within federal jurisdiction are "likely to be, to some extent, significant" (such drafting allowing considerable room for interpretation and a relatively low hurdle), the project can proceed only if the federal Minister or Governor in Council deems the project to be justified in the public interest. A proponent faced with the prospect of an expensive, multi-year review with an unpredictable outcome based merely on the potential for a defined, non-negligible adverse federal effect will likely be concerned, and may decide not to proceed with a project.

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[133] Where currently section 63 refers to, for example, the extent to which the project itself contributes to or hinders sustainability or Canada's ability to meet its climate change commitments, the amendments add a focus on whether the "effects of the project" result in the same contributions or hindrances. These changes appear to be intended to address findings in the *IAA Reference* that the *IAA* regulates the project as a project, rather than maintaining a constitutionally permissible focus on federal effects. It is questionable whether this slight change in language amounts to meaningful change in the nature of the overall public interest determination.

[134] Mike Lapointe, "Supreme Court's Impact Assessment Act Ruling Not a Repudiation of Federal Power Over Climate Protection, MPs and Experts Say, but Urgent Fix Needed for Law," *The Hill Times* (23 October 2023), online: [perma.cc/24RN-Y6JN].

In this respect, the proposed amendments to the section 63 public interest provisions (the Amendments) may not necessarily resolve the constitutional issues identified by the Supreme Court of Canada. Specifically, with the Amendments, the decision-maker is still permitted to consider the adverse non-federal effects of the designated project (for example, through the "sustainability" factor) when determining whether the adverse effects within federal jurisdiction are justified in the public interest. The Supreme Court majority explicitly identified this aspect of the *IAA* as constitutionally problematic.[135] And, as before, a negative public interest decision would mean the section 7 prohibition remains in effect indefinitely vis-à-vis the designated project, meaning the project as a whole is effectively stopped in its tracks regardless of whether Parliament has underlying jurisdiction to regulate the physical activity itself.

Further assessment of the Amendments as ultimately enacted will be necessary to determine whether they will be effective in overcoming the constitutional concerns identified in the Supreme Court's *IAA Reference*. However, as demonstrated by this, adopting EA legislation that addresses such concerns, while providing for responsible and effective impact assessment, remains an ongoing legislative challenge.

X. BEYOND THE *IAA*

Part of the challenge in creating coherent and predictable guardrails for federal EA legislation is perhaps an understandable aversion to categorizing projects as "federal" or "provincial." This aversion stems in part from an often quoted passage of *Oldman River*, in which the Supreme Court stated:

> What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question [of *EARPGO*'s *vires*] 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.[136]

But while such a distinction may not have been particularly helpful in the context of a constitutional analysis of legislation, in the context of planning and regulating projects it is indeed very useful to distinguish between activities over which Parliament has broad jurisdiction to regulate (such as railways, interprovincial pipelines and power lines, nuclear facilities, and offshore developments) and intra-provincial works and undertakings over which its jurisdiction to regulate stems from the project's effects on matters in areas of federal jurisdiction (such as fisheries, navigation, and extra-provincial impacts). Justice La Forest anticipated this distinction in *Oldman River*, noting that Parliament can play a "somewhat different environmental role" in exercising this effects-based jurisdiction as compared to regulating activities over which it has plenary jurisdiction.[137]

As Steven Kennett initially noted shortly after *Oldman River* was decided, Justice La Forest's reasons recognize implicitly that there is a conceptual distinction between areas of

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[135] *IAA Reference* SCC, *supra* note 4 at paras 167–69.
[136] *Oldman River*, *supra* note 1 at 68.
[137] *Ibid* at 67.

"comprehensive" and "restricted" federal jurisdiction. Kennett suggested that this distinction can form the basis of a coherent theory of federal EA jurisdiction, concluding that when jurisdiction over the activity is restricted, there are constitutional limits on environmental regulation and EA.[138] The majority's reasons in the *IAA Reference* endorsed this type of distinction.[139] While affirming that it is important to avoid the impression that some projects fall within an enclave of provincial or federal exclusivity, Chief Justice Wagner explained:

> 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.[140]

As an example, the majority, citing *Moses*, describes the activity of constructing an intra-provincial mine as falling primarily within provincial jurisdiction in relation to natural resources, such that the province may regulate the activity broadly. Federal legislative competence to regulate the activity in such circumstances would be limited to the construction's impacts on specific resources such as fisheries and navigable waters.[141]

The Supreme Court majority's reasons in the *IAA Reference* do support a comprehensive regulatory scheme to assess and regulate designated projects where there is plenary federal jurisdiction over the activities themselves. This would include the portion of the *IAA* applicable to federal lands and undertakings which the majority found intra vires, and presumably would also include activities such as interprovincial railways and interprovincial pipelines over which the federal government exercises "comprehensive" jurisdiction (to use Kennett's term). The challenge for federal lawmakers is to establish a constitutionally sound framework where the federal government has restricted jurisdiction (in the sense used by Kennett) over an aspect of the project, such as the bridges or watercourse alterations considered in *Tolko*, *Sunpine*, and *TrueNorth*.

As the discussion above suggests, the extent to which an amended *IAA* meets this challenge will undoubtedly generate much debate. By continuing to subject designated projects over which the federal government has only limited jurisdiction to a broad regulatory regime anchored in self-defined effects within federal jurisdiction (non-negligible or otherwise), the *IAA* remains a "Trojan Horse" by which federal authorities could effectively veto a designated project on the basis of relatively minor effects on aspects of an activity that fall under federal jurisdiction.

To avoid the potential for overreach in federal assessments involving restricted federal jurisdiction, procedural aspects of the *IAA* should also focus on assessing the impact of the specific adverse effects within federal competency — as the Supreme Court assumed they would under *EARPGO* in the *Oldman River* decision. This was indeed federal policy under

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[138] Steven A Kennett, "Federal Environmental Jurisdiction After *Oldman*," Case Comment (1993) 38:1 McGill LJ 180 at 203.

[139] *IAA Reference* SCC, *supra* note 4 at paras 123–28.

[140] *Ibid* at para 128 [emphasis in original].

[141] *Ibid* at para 127.

EARPGO and *CEAA 1992*. As discussed above, the Federal Court of Appeal repeatedly upheld scoping to trigger as a constitutionally and practically justifiable approach where the federal government had restricted jurisdiction only and provincial EA processes addressed the broader scope of the project. However, this flexibility disappeared under the designated project framework introduced by *CEAA 2012*. Discretion for federal authorities to scope their assessments according to the aspects of a project over which they have jurisdiction is a necessary component of federal EA and deserves renewed attention following the *IAA Reference*.

XI. CONCLUSION

Canada's first EA legislation, *EARPGO*, established procedures for incorporating EA into existing federal decision-making. Successive generations of federal EA legislation added features to *EARPGO* that were not subjected to probing constitutional analysis until the result of this evolution was addressed and rejected by a majority of the Supreme Court of Canada in the *IAA Reference.* These features included the removal of an affirmative regulatory duty as the basis for triggering; the introduction of a substantive regulatory regime purporting to prohibit a proponent from taking any action in connection with designated projects based on prohibitions and penalties for proceeding with designated projects; expansion of mandatory factors which an assessment must take into account; and a shift from decision-making focused on significant adverse environmental effects identified during assessment toward a broad public interest decision.

As the Supreme Court's decision in the *IAA Reference* underscores, a substantive federal regulatory regime to prevent adverse environmental effects within federal jurisdiction demands "great sensitivity" to ensure such a regime comports with the constitutional division of powers.[142] The *IAA* failed to address the difference between projects over which the federal government has comprehensive jurisdiction to regulate the entire scope of the activity and projects over which it has restricted jurisdiction over those aspects of the project causing effects on matters of federal concern. While the *IAA Reference* clearly affirms that Parliament has broad jurisdiction in connection with the former types of projects to enact the type of regime created in the *IAA*, the challenge going forward will be to ensure that replacement legislation provides clear guardrails in the case of the latter types of projects.

Proposed amendments to the *IAA* offer surgical changes but do not address the fundamental flaws in the current regime. The former *CEAA 1992* provides one proven blueprint by tethering assessment to an affirmative federal regulatory duty and providing opportunities for decision-makers to tailor the scope of the EA process and decision-making to that specific regulatory duty. Future legislation must, at a minimum, allow for the same.

[142] *Ibid* at para 4, citing *R v Hydro-Québec*, 1997 CanLII 318 at para 154 (SCC).