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THE CONSTITUTION AND THE *IMPACT ASSESSMENT ACT*

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The Constitution and the Impact Assessment Act
(HillStudies)

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EXECUTIVE SUMMARY

This HillStudy is the second of a two-part examination of how the Supreme Court of Canada (the Supreme Court or the Court) has interpreted federal environmental law in light of Canada's constitutional division of powers. It is a companion piece to the HillStudy entitled *The Constitution and Carbon Pricing*, which reviews the legal challenges to the *Greenhouse Gas Pollution Pricing Act* in *References re* Greenhouse Gas Pollution Pricing Act.

The focus of this paper is the Supreme Court's 2023 decision in *Reference re* Impact Assessment Act, which sets out a scheme for determining whether specified major natural resource and infrastructure projects require an impact assessment and, if so, the components of that impact assessment.

Together, these two HillStudies explore two Supreme Court decisions on environmental law. Each decision was arrived at through a different approach, and each offers insight into what is and is not constitutionally acceptable, and why. Both are significant decisions – the decision in the *Reference re* Impact Assessment Act was the Court's most substantial examination of federal authority over environmental assessment in 30 years – and both cases are likely to shape the evolution of future environmental legislation at the federal and provincial levels for years to come.

THE CONSTITUTION AND THE *IMPACT ASSESSMENT ACT*[*]

1 INTRODUCTION

The environment is a shared responsibility in Canada. The term "environment" does not appear in the *Constitution Act, 1867* (the Constitution), and its subject matter is divided between areas of federal and provincial jurisdiction.[1] Laws relating to fisheries, for example, fall within the exclusive jurisdiction of the federal government, while provinces are generally responsible for the management of water within provincial boundaries, such as lakes, rivers and public drinking water. Therefore, either level of government may enact laws concerning the environment; however, these laws must be carefully crafted to ensure the subject matter or essential nature of the legislation respects the jurisdictional limitations imposed by the Constitution.

2 *REFERENCE RE* IMPACT ASSESSMENT ACT

In June 2019, the federal government enacted the *Impact Assessment Act* (the IAA or the Act),[2] which replaced the *Canadian Environmental Assessment Act, 2012* and set out a regime for assessing the impacts of "designated projects" carried out in Canada. These projects are generally major energy, infrastructure and mining projects, and they are spelled out in the *Physical Activities Regulations* (the Regulations)[3] made under the IAA. Projects listed in the Regulations (sometimes referred to as the Projects List) are those that, in the federal government's view, are major projects with the greatest potential for adverse effects on areas of federal jurisdiction related to the environment. The Act also allows the Minister of the Environment to designate a project that is not prescribed by regulation if, in the minister's opinion, the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects. Among the reforms contained in the IAA was a move beyond an *environmental* assessment to an *impact* assessment, which takes into account all positive and negative environmental, social, economic, cultural and heritage impacts of designated projects. As well, the IAA set out a broader public interest test than that contained in previous federal environmental assessment legislation.

In 2019, the Government of Alberta referred two questions to that province's Court of Appeal. It asked whether the IAA was unconstitutional, in whole or in part, as being beyond the authority of Parliament under the Constitution. It also asked if the Regulations made under the Act were unconstitutional, in whole or in part, in applying to certain activities that relate to matters within the exclusive legislative jurisdiction of the provinces. A majority of the Court of Appeal of Alberta concluded that the IAA and the Regulations were *ultra vires* (beyond the authority of) Parliament and therefore unconstitutional in their entirety. The Attorney General of Canada appealed that decision to the Supreme Court of Canada (the Supreme Court or the Court).[4]

Like the *References re* Greenhouse Gas Pollution Pricing Act (the GGPPA References),[5] the *Reference re* Impact Assessment Act (the IAA Reference) focused on the division of powers between the federal and provincial governments as set out in the Constitution. The federal government claimed that the IAA was a valid exercise of the powers it possesses set out in sections 91 and 132: sea coast and inland fisheries (section 91(12)); "Indians, and Lands reserved for the Indians" (section 91(24)); treaty obligations (section 132, in relation to migratory birds);[6] and the national concern branch of the peace, order and good government (POGG) power (section 91). The Government of Alberta argued that the IAA interferes with the exclusive powers of the province as set out in section 92, namely, property and civil rights in the province (section 92(13)); matters of a local or private nature (section 92(16)); local works and undertakings (section 92(10)); and non-renewable natural resources, forestry resources, and electrical energy (section 92A).

In October 2023, a five-to-two majority[7] of the Supreme Court released a reference opinion[8] that the IAA was largely unconstitutional. It held that most of the Act was overly broad and not limited to regulating "effects within federal jurisdiction" and therefore infringes the exclusive legislative jurisdiction of the provinces. The two-member minority[9] of the Court held that the IAA was constitutional in its entirety as a valid exercise of federal power.

2.1 THE STRUCTURE OF THE *IMPACT ASSESSMENT ACT*

While there was a divergence in opinion on whether most of the IAA was constitutional or not and upon what grounds, both the majority and minority were aligned in finding that the IAA and the accompanying Regulations have two components with two distinct regulatory schemes.[10] A primary scheme addressing physical activities identified as "designated projects" takes up most of the IAA, and a secondary scheme in sections 81 through 91 applies to projects carried out or financed by federal authorities on federal lands or outside Canada. Both the majority and minority held that the secondary scheme in sections 81 through 91 is constitutionally valid.[11] The minority agreed with the majority's assessment that this portion of the IAA provides direction to federal authorities exercising their decision-making power in relation to projects that they undertake or fund themselves on federal lands or outside Canada to assess the environmental effects those projects may have.[12] The majority stated that this portion of the scheme is clearly within the legislative authority of Parliament.[13] Indeed, these provisions of the IAA were not challenged in arguments before the Supreme Court. For the majority, it was the primary – or designated projects – scheme making up the bulk of the IAA that failed to pass constitutional muster.

The assessment process for designated projects has three separate phases:

- the planning phase, which focuses on initial information gathering, after which the Impact Assessment Agency of Canada will consult and decide if an impact assessment is required;
- the impact assessment phase, where the project proponent provides required information and reports for the preparation of an assessment report setting out the likely effects caused by the project; and
- the decision-making phase, where the decision-maker (either the Minister of the Environment or the federal Cabinet) determines whether the adverse effects within federal jurisdiction are in the public interest and, if so, establishes any conditions in relation to those effects (the public interest determination).

2.2 THE MAJORITY OPINION

2.2.1 Pith and Substance: What Is the *Impact Assessment Act* Really About?

The majority opinion examined the purpose and the legal and practical effects of the IAA. It found that the Act creates "a comprehensive information-gathering and regulatory process," throughout which broad temporary holds are placed on designated projects until the Impact Assessment Agency of Canada is satisfied that it has sufficient information to decide whether an impact assessment is required. Following the public interest determination, the IAA continues to regulate the designated project "with a view to preventing or mitigating its effects."[14]

The majority thus characterized the true nature, or "pith and substance," of the "designated projects" component of the IAA as one designed "to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts."[15] The Act casts a wide net, taking into account "all effects, both positive and adverse."[16] Indeed, the term "effects within federal jurisdiction" is defined to encompass not only specific heads of federal legislative power such as fisheries or migratory birds,[17] but also "a change to the environment that would occur … in a province other than the one where the physical activity or the designated project is being carried out."[18] The term "effects within federal jurisdiction" lacks specificity and a connection to a clear and recognized federal power. The Court characterized the breadth of this "interprovincial effects" clause as "astonishing."[19]

Accordingly, it held that this regime is broader than one solely designed to assess and regulate the effects of a designated project that are restricted to areas of federal legislative competency.

2.2.2 Classification: Under What Head(s) of Power Does the *Impact Assessment Act* Fall?

Having determined the IAA's essential character, the majority then looked to classify it in relation to the division of legislative powers in sections 91 and 92 of the Constitution. This is a vexing question given that environmental matters can overlap with several federal and provincial heads of power.

It was the majority's view that the Act went beyond assessing the impacts and effects on areas within federal jurisdiction and instead assessed all projects in the same way regardless of whether Parliament had jurisdiction "over the activity itself or narrower jurisdiction over the activity's impacts on federal heads of power."[20] It further noted that a number of the physical activities regulated under the IAA are those that fall within provincial jurisdiction as local works and undertakings or natural resources.[21] While the majority held that there is no question that Parliament may legislate in relation to a designated project's "effects within federal jurisdiction," it is constitutionally impermissible for it to enact laws that are the exclusive jurisdiction of the provinces.

While both the majority and minority held that the information-gathering and assessment phases of the IAA were constitutionally sound, the majority found the decision-making phase to be problematic. The majority distinguished between "environmental *assessment*" and "environmental *decision making*" [EMPHASIS IN THE ORIGINAL].[22] It stated that while the federal government is restricted to legislating over environmental activities only in those areas within its jurisdiction, "it is not similarly limited in its information gathering and assessment."[23] The federal government can thus gather information and assess the environmental effects of a project that are not federal in nature; however, it cannot make decisions with respect to activities that are not within its jurisdiction.

2.2.3 The Decision-Making Phase

Within the designated projects scheme, there are two significant determinations. The first is whether a project requires an impact assessment; the second is whether the adverse effects of a project on the environment are in the public interest.

In determining if an assessment is required, the IAA requires decision-makers to consider an open-ended list of equally important factors[24] – many of which are not tied to federal jurisdiction and which focus on the project as a whole – rather than make a narrower determination of adverse factors within federal jurisdiction.[25] Casting such a wide net results in the risk that "projects with little or no potential for adverse federal effects will nonetheless be required to undergo an impact assessment."[26] For the majority, "[t]he fact that this decision is not driven by the likelihood of federal impacts demonstrates that the 'main thrust' of the scheme strays from federal matters."[27]

The public interest determination is similarly constitutionally fraught. Again, the factors that must be considered were deemed by the majority to be overly broad and insufficiently limited to federal legislative competence. The Court cited the requirement to consider "sustainability" as an example. It is defined in the IAA as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations."[28] This definition "encompasses all environmental, social and economic effects, not only those that the federal government has jurisdiction to regulate."[29]

As well, some listed factors are framed such that they relate to an assessment of the project as a whole rather than being limited to adverse "effects within federal jurisdiction." For example, the decision-maker is required to consider how a "*designated project* contributes to sustainability" and "the extent to which *the effects of the designated project* … hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change" [EMPHASIS IN THE ORIGINAL].[30] The majority noted that these considerations are not limited to federal effects only. Rather, it stated that the designated projects scheme "grants the decision maker a practically untrammelled power to regulate projects [as] projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety."[31] The IAA attempts to regulate activities and projects that are within the exclusive legislative powers of the provinces. This lack of focus on activities and effects within federal jurisdiction led the majority to conclude that the designated projects process contained in the Act was unconstitutional.

2.2.4 The National Concern Branch of the Peace, Order and Good Government Power[32]

In its submissions to the Court, the federal government argued that regulating the "interprovincial effects" of a designated project is a matter of national concern under the POGG power. It relied on earlier Supreme Court jurisprudence that upheld federal legislation aimed at preventing interprovincial water and interprovincial air pollution as a valid use of this power.[33] While the majority recognized that the national concern branch had recently been used to uphold the GGPPA, it noted that that Act was limited to carbon pricing of greenhouse gas emissions, which the Court had characterized in its GGPPA References decision as "a narrow and specific regulatory mechanism."[34] By contrast, the definition of "interprovincial effects" in the "designated projects" scheme of the IAA lacked the required specificity in terms of the type or scale of the change to the environment to clearly link it to a federal effect.[35] Indeed, in the GGPPA References case, the majority stated unambiguously that federal legislation that attempted to comprehensively, as opposed to narrowly, regulate greenhouse gas emissions would not be considered as a valid matter of national concern.[36]

2.3 THE DISSENTING OPINION

Two members of the Court issued a dissenting opinion, holding that the IAA and its Regulations were constitutional in their entirety as a valid exercise of federal power.[37] Central to their reaching this conclusion was their characterization of the pith and substance of the Act. In contrast to the majority opinion, the minority stated that the true purpose of the IAA is to

> establish an environmental assessment process to (1) assess the effects of physical activities or major projects on federal lands, Indigenous peoples, fisheries, migratory birds, and lands, air, or waters outside Canada or in provinces other than where a project is located, and (2) determine whether to impose restrictions on the project to safeguard against significant adverse federal effects, unless allowing those effects is in the public interest.[38]

This narrow characterization allowed the minority to then classify the designated projects scheme within these specific federal heads of power. This interpretation demonstrates both the significance of the pith and substance determination and the degree to which legislation may be interpreted in differing ways. The result is that resolving whether a given piece of legislation is constitutionally valid is seldom straightforward.

In reaching the conclusion that the IAA is valid federal legislation, the minority leaned into themes of cooperative federalism.[39] It stressed that the environment, by its very nature, is complex, diffuse and involves issues that span both federal and provincial jurisdiction.[40] Constitutional interpretation requires "co-operation among governments and legislatures for the common good," and environmental legislation must be interpreted with flexibility and respect.[41] They also noted the "presumption of constitutionality" that holds that "every legislative provision is presumed to be [within the constitutional authority] of the level of government that enacted it" and the government's authority "exercised in good faith."[42] For the minority, adhering to these principles allowed them to interpret the IAA's designated project scheme as applying only to those areas within a narrow band of specified federal powers. The minority acknowledged that the Act requires decision-makers to consider some factors that are not within Parliament's jurisdiction. However, as long as the decision is rooted in matters related to federal jurisdiction, the fact that it incidentally touches on a provincial head of power does not affect its constitutionality.[43]

The minority's reasoning is at odds with that of the majority. The minority's narrow focus, reliance on cooperative federalism and presumptions of good faith contrast sharply with that of the majority's concerns with a lack of specificity and an "untrammelled power" to regulate whole projects and the "astonishing" breadth of certain clauses.[44]

2.4 AMENDMENTS TO THE *IMPACT ASSESSMENT ACT* IN LIGHT OF THE SUPREME COURT OF CANADA'S DECISION

In response to the Supreme Court's decision in the IAA Reference case, in May 2024, the federal government introduced amendments to the IAA. These were contained in Bill C-69, a budget implementation bill, which received Royal Assent in June 2024.[45] The amendments sought to narrow the scope of the Act to align more closely with federal legislative authority. The definition of "effects within federal jurisdiction" was replaced with "adverse effects within federal jurisdiction"; these were further limited to "a non-negligible adverse change" to establish a threshold and exclude trivial or positive effects that might otherwise trigger a federal assessment.[46]

Federal jurisdiction under the IAA is now restricted to a non-negligible adverse change to fish and fish habitat, aquatic species and migratory birds; a non-negligible adverse change to the environment occurring on federal lands; and a non-negligible change to the environment that directly impacts Indigenous Peoples.[47] Interprovincial and transboundary effects are limited to a non-negligible adverse change caused by pollution to interprovincial or international waters and to the marine environment outside of Canada.[48] It is worth noting that transboundary air pollution is not included in the changes to be considered. This is possibly because the Court made it clear in the GGPPA References decision that federal legislation that attempted to comprehensively, as opposed to narrowly, regulate greenhouse gas emissions would not fall within federal jurisdiction, at least under the national concern branch.[49]

Amendments to the decision-making process were intended to ensure that decisions are focused on areas of federal jurisdiction and limited to non-negligible adverse changes under specific federal heads of power, that is, fish and fish habitat, migratory birds, federal lands, narrowly defined transboundary effects, and impacts on Indigenous Peoples.[50] Before the Impact Assessment Agency of Canada decides whether an impact assessment of a designated project is required, it must consider the non-negligible adverse changes within federal jurisdiction or the direct or incidental adverse effects that may be caused by the carrying out of the project.[51] It must also now consider whether other means to address the adverse effects within federal jurisdiction exist.[52]

The factors that the decision-maker must consider in the public interest determination have been reduced and narrowed and are now more clearly linked to federal areas of jurisdiction and more tightly tied to the effects that are likely to be caused by the project, rather than to the project itself.[53]

2.5 DISCUSSION

The IAA Reference decision, which was the most significant examination of federal authority over environmental assessment since *Friends of the Oldman River Society v. Canada (Minister of Transport)*[54] was decided more than 30 years ago, makes a number of important statements. Since 1992, the Supreme Court has consistently referred to environmental protection as "one of the major challenges of our time."[55] It repeated that assertion in 1997 in *R. v. Hydro-Québec*, adding that it "is an international problem, one that requires action by governments at all levels."[56] In the IAA Reference decision, the Court reiterated that "[e]nvironmental protection remains one of today's most pressing challenges."[57] The Court has been equally consistent in noting that the subject matter of the environment touches on federal and provincial heads of power and therefore no one level of government occupies the field.[58]

The Court in the IAA Reference affirmed Parliament's authority to enact impact assessment legislation that is directed at the federal aspects of projects, but it also clearly affirmed that it must confine its legislative efforts to its own constitutional sphere.

Most significantly, stakeholders, including for example, the Government of Saskatchewan, have noted that this decision may be viewed as a robust defence of provincial autonomy and an emphatic rejection of federal intrusion into provincial space.[59] The majority drew a clear line between the federal government's ability to collect information on and assess the environmental impacts of a wide range of effects and activities, and its authority to make decisions about those effects and activities. While Parliament has significant latitude for the former, it must only make decisions with respect to those effects and activities within federal jurisdiction. Moreover, decisions must be clearly linked to clearly federal jurisdiction. In this respect, the majority's concern with the IAA's lack of specificity is evident in its characterization of the Act as granting the decision-maker "practically untrammelled power" to regulate entire projects without regard as to "whether Parliament has jurisdiction to regulate a given physical activity."[60]

It is well established that the environment as a subject matter is not confined to one jurisdiction but overlaps with a number of federal and provincial heads of power. Therefore, it is not surprising that the majority and minority opinions noted the positive role that intergovernmental cooperation can play in environmental protection. However, cooperative federalism must start with a clear recognition of and adherence to constitutional boundaries, and here, in the opinion of the majority, Parliament fell short.

Both the GGPPA and the IAA references highlight the critical importance of categorizing the true nature of the legislation in question – the pith and substance inquiry. This is a key determination from which constitutional adjudication flows.

The divergence between the majority and minority opinions in both cases shows how different characterizations of the law can lead to very different constitutional outcomes. Differences of opinion are nothing new in legal cases; this is why courts of appeal exist. When these differences manifest in the highest court, they illustrate how challenging it can be to categorize legislation. They also demonstrate a degree of subjectivity to the categorization process, which can contribute to the uncertainty of interpreting environmental legislation.

Once the pith and substance of a law is determined, most legislation will be classified under one or more of the heads of power listed in section 91 or 92 of the Constitution. That the GGPPA was only the seventh Act since Confederation upheld under the national concern branch of the POGG clause demonstrates the rarity of this pathway to constitutional validity. It is generally easier to locate legislation under a named power than to meet the high threshold required for finding something a matter of national concern. Both the majority and minority opinions in the GGPPA References noted that the residual power in the POGG clause is a "rarely applied doctrine"[61] that should be used only as a "last resort."[62] What constitutes such a last resort will always be subject to debate.

It is reasonable to expect that any forthcoming constitutional challenges involving environmental law will focus on the division of powers arguments. Parliament must clearly link the activities it seeks to regulate to a clearly identified federal head of power. If federal environmental legislation is aimed at protecting fish or fish habitat, for example, it will be expected that that link will be clearly demonstrated. The defence of provincial autonomy delivered by the majority in the IAA Reference opinion may make issues of jurisdiction clearer. Moreover, the Court's pronounced dismissal of federal intrusion into provincial jurisdiction may embolden provinces to challenge more legislation on the basis that it interferes with provincial rights.

The amendments to the IAA in light of the Court's opinion may provide an early lesson on how new federal environmental legislation is received. They will certainly be scrutinized to ensure they are confined within Parliament's jurisdictional boundaries. For example, in response to the Supreme Court's concerns that the definition of "effects within federal jurisdiction" in the IAA went far beyond the federal government's jurisdiction, the amended Act now refers to "adverse effects within federal jurisdiction." This definition is further refined to include "a non-negligible adverse change" to matters within federal authority. The term "non-negligible" is not defined, so it is unclear how it will be interpreted and applied. It is worth noting that the IAA's predecessor legislation, the *Canadian Environmental Assessment Act, 2012* and the *Canadian Environmental Assessment Act* had both used the term "significant adverse environmental effects" within federal jurisdiction since 1992.[63] The term "significant" was not defined in either Act. Is "non-negligible" similar to "significant"? If so, how? If not, in what way is it different? It may be that "non-negligible" occupies some middle space between "none" and "significant." It is

likely that what is considered "non-negligible" will depend on the specific circumstances of each project.

Since a key characteristic of the environment – both as a constitutional subject matter and in environmental legislation – is the potential for jurisdictional overlap and uncertainty, it is clear that questions of jurisdiction will continue to be asked. The GGPPA and IAA reference opinions provide some insights and guidance into the constitutional limits of legislation, but as environmental law evolves, they are unlikely to provide the last word on the subject.

NOTES

* A HillStudy entitled *The Constitution and Carbon Pricing* is a companion piece to the present study. It reviews the legal challenges to the *Greenhouse Gas Pollution Pricing Act* in *References re* Greenhouse Gas Pollution Pricing Act. Sam N. K. Banks, *The Constitution and Carbon Pricing*, Publication no. 2025-01-E, Library of Parliament, 15 October 2025.

1. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). Under the *Constitution Act, 1867*, Canada's three territories do not have any jurisdiction in their own right. Rather, Parliament has full legislative jurisdiction over them. However, over time, much of this power has been delegated to the territorial legislatures through devolution.

2. *Impact Assessment Act* (IAA), S.C. 2019, c. 28, s. 1 (version in force from 28 August 2019 to 19 June 2024). Unless indicated otherwise, all references to the IAA are to the version that was in force at the time of the Supreme Court of Canada's (the Supreme Court's) opinion in *Reference re* Impact Assessment Act. *Reference re* Impact Assessment Act, 2023 SCC 23. The IAA was enacted with the enactment of Bill C-69, a budget implementation bill. See Bill C-69, An Act to enact the Impact Assessment Act, the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, 42nd Parliament, 1st Session (S.C. 2019, c. 28). For more details, see section 2.1 of Sam N. K. Banks, Alexandre Lavoie and Nicole Sweeney, *Legislative Summary of Bill C-69: An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, Publication no. 42-1-C69-E, Library of Parliament, 21 June 2019.

3. *Physical Activities Regulations* (the Regulations), SOR/2019-285.

4. *Reference re* Impact Assessment Act, 2023 SCC 23

5. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.

6. *Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, 16 August 1916, [1917] Gr. Brit. T.S. No. 7 (Cd. 8476). The original convention was entered into by the British Empire and the United States. Canada and the United States later amended that convention in 1995 through a protocol (*Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, Can. T.S. 1999 No. 34). Canada then implemented the protocol domestically through the *Migratory Birds Convention Act, 1994*. See *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22.

7. Chief Justice Wagner, authoring the majority opinion on behalf of Justices Côté, Rowe, Martin and Kasirer.

8. While this was a reference question and therefore technically not a ruling, the terms "decision" and "held" are used for reasons of simplicity.

9. Justices Karakatsanis and Jamal signed the dissenting opinions.

10. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 5. The Supreme Court considered both the IAA and the Regulations together, noting that the "Regulations complete the statutory scheme by specifying the scope of the [IAA]'s application to certain 'designated projects'; they are indispensable to the [IAA]'s characterization and classification." Ibid., para. 59.

11. Ibid., paras. 208 and 210.
12. Ibid., paras. 109 and 220.
13. Ibid., para. 5.
14. Ibid., para. 108.
15. Ibid., para. 204.
16. *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, s. 6(1)(c) (version in force from 28 August 2019 to 19 June 2024).
17. Ibid., s. 2. See paragraphs (a)(i) and (a)(iii) under the definition of "effects within federal jurisdiction."
18. Ibid. See paragraph (b)(ii) under the definition of "effects within federal jurisdiction."
19. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 183.
20. Ibid., para. 132.
21. Ibid.
22. Ibid., para. 157.
23. Ibid.
24. *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, s. 16(2) (version in force from 28 August 2019 to 19 June 2024).
25. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 151.
26. Ibid., para. 154.
27. Ibid.
28. *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, s. 2 (version in force from 28 August 2019 to 19 June 2024).
29. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 167.
30. Ibid., para. 168.
31. Ibid., para. 178.
32 . See section 2.1 1, "The Peace, Order and Good Government Power and the National Concern Doctrine," in Sam N. K. Banks, *The Constitution and Carbon Pricing*, Publication no. 2025-01-E, Library of Parliament, 15 October 2025.
33. *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 S.C.R. 477; and *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.
34. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 199.
35. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 186.
36. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 199.
37. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 217 (Justices Karakatsanis and Jamal).
38. Ibid., para. 257.
39. See section 3.5 in Dara Lithwick, *A pas de deux: The Division of Federal and Provincial Legislative Powers in Sections 91 and 92 of the* Constitution Act, 1867, Publication no. 2015-128-E, Library of Parliament, 8 December 2015.
40. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 219.
41. Ibid., para. 228.
42. Ibid., paras. 229 and 314.
43. Ibid., para. 253.
44. Ibid., paras. 178 and 183.

45. Bill C-69, An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024, 44th Parliament, 1st Session (S.C. 2024, c. 17). The amendments to the IAA are set out in Part 4, Division 28 of the bill. For more details, see section 2.4.28 of the *Legislative Summary of Bill C-69: An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*, Budget implementation bill (unedited), Publication no. 44-1-C69-E, Library of Parliament, 31 May 2024.

46. *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, s. 2. See (a) to (g) under the definition of "adverse effects within federal jurisdiction."

47. Ibid.

48. Ibid. See (c) and (d) under the definition of "adverse effects within federal jurisdiction." It appears that these limitations are restricted to existing areas of federal competence. Federal jurisdiction over interprovincial water pollution and marine pollution was established in Supreme Court decisions in *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 S.C.R. 477 (interprovincial water pollution); and *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (marine pollution).

49. As noted in section 2.2.4. of this HillStudy, the majority of the Supreme Court upheld the *Greenhouse Gas Pollution Pricing Act* as a valid matter of national concern because it viewed the subject matter of that Act as "limited to GHG [greenhouse gas] pricing of GHG emissions" and was, therefore, "a narrow and specific regulatory mechanism." See *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 199.

50. *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, s. 2. See (a) to (g) under the definition of "adverse effects within federal jurisdiction."

51. Ibid., s. 16(2)(b).

52. Ibid., s. 9(2)(d). Similarly, the discretionary power of the Minister of the Environment to designate a physical activity that is not prescribed by regulation is amended and constrained to only those physical activities that "may cause [non-negligible] adverse effects within federal jurisdiction or direct or incidental adverse effects." Before exercising this discretion, the minister now must also consider whether there is another means to address the adverse effects within federal jurisdiction other than impact assessment.

53. Ibid., s. 63.

54. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

55. Ibid.

56. *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, para. 127.

57. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 7.

58. See, for example, *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; and *Reference re* Impact Assessment Act, 2023 SCC 23.

59. Government of Saskatchewan, "Supreme Court Strikes Down Federal Impact Assessment Act Reference Case," News release, 13 October 2023.

60. *Reference* re Impact Assessment Act, 2023 SCC 23, para. 178.

61. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 4.

62. Ibid., para. 457.

63. *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, s. 4(1); and *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 4(c). The *Canadian Environmental Assessment Act, 2012* was repealed in 2019, and the *Canadian Environmental Assessment Act* was repealed in 2012.