

Wait, What!? What the Supreme Court Actually Said in the *IAA Reference*

By: Martin Olszynski, Nigel Bankes, and David Wright

Case Commented On: *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#)

This past Friday, October 13, the Supreme Court of Canada released its opinion in *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#) (*IAA Reference*). Writing for a 5:2 majority (Justices Mahmud Jamal and Andromache Karakatsanis dissenting), Chief Justice Richard Wagner held that what is known as the “designated project” (or “major project” in colloquial terms) review scheme of the Impact Assessment Act, [SC 2019, c 28, s 1](#) (“IAA”) is unconstitutional. This post sets out what is, and is not, constitutional about the *IAA* regime. We begin by first clarifying the Act’s current legal status. We then set out the principles – post-*IAA Reference* – of federal and provincial jurisdiction over the environment generally, and then with respect to impact assessment specifically. This is followed by a discussion of the *IAA*’s specific constitutional defects as found by the majority, the implications of those defects, and their potential remedies. We conclude with some observations regarding the *IAA Reference*’s relevance to future constitutional battles over federal clean electricity regulations and an oil and gas greenhouse gas emissions cap.

The Current Legal Status of the *IAA* and Regulations

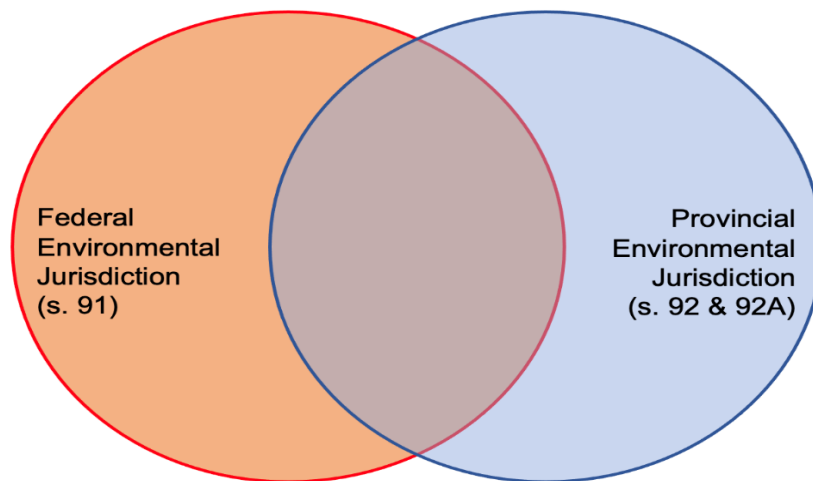
This was a reference case brought by the Alberta government, which means that the Court did not strike down the *IAA* (that would require an actual challenge to the law, e.g., by a project proponent subject to the *IAA*). References provide the Court’s opinion on specific legal issues rather than a definitive determination of legal validity. This means that the *IAA* regime as currently written *still applies* throughout Canada. That being said, proponents can expect that the Impact Assessment Agency of Canada (Agency) will address any necessary changes arising from the implementation of the Court’s decision in the near term, and that the federal government will introduce amendments to the law as soon as reasonably possible (as further set out below, the required changes appear relatively manageable). While it is possible that a proponent would seek to have the *IAA* struck down in the interim, we suspect that a court would agree to any federal request to pause any such litigation for a reasonable period of time while these changes are being pursued.

Environmental Jurisdiction After the *IAA Reference*

In what follows, we list a number of propositions that can now be considered settled law in terms of jurisdiction over the environment *generally* under Canada’s Constitution. Each principle or statement cites the relevant passage(s) from the *IAA Reference*. The figures are our own. Readers unfamiliar with the legislative division of powers between the federal and provincial governments are welcome to watch this [brief three-minute video](#) first, and can also review an [earlier post](#) by one of us.

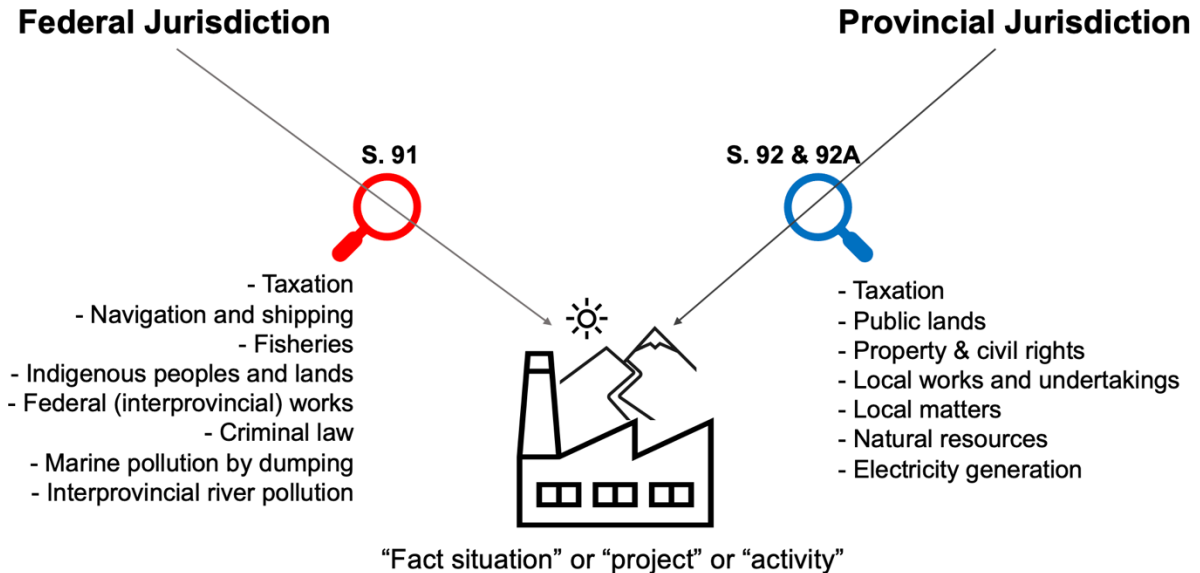
- 1) The “environment” is not listed anywhere in the [Constitution Act, 1867](#). Rather, each level of government can pass laws in relation to the environment through their other legislative authorities (also called heads of power) listed there. Responsibility for environmental protection is therefore *shared*, with considerable *overlap* (see Figure 1, below). This shared responsibility is neither unusual nor unworkable (*IAA Reference* at paras 114, 116).

Figure 1: Jurisdiction over the Environment – Shared and Overlapping



- 2) Both the federal and provincial governments can, in certain circumstances, exercise legislative authority over *the same fact situation, activity, or project*. The “double aspect doctrine” allows that the same set of facts can be regulated from different perspectives or aspects, with the federal government using heads of power falling within section 91, and provincial governments using heads of power within sections 92 or 92A (see Figure 2 below) (*IAA Reference* at paras 117 and 119). In the event of a conflict or inconsistency between federal and provincial laws, the federal law will prevail on the basis of the doctrine of paramountcy (there was no direct discussion of paramountcy in the *IAA Reference* but this proposition follows from numerous authorities, including most recently *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 at paras 129 – 130 and 197](#)).

Figure 2: The Double Aspect Doctrine – One Fact Situation, Two Aspects



- 3) A few heads of power (ss 92A(3) (export from provinces of resources), 92A(4) (taxation of non-renewable natural resources, forestry resources and electricity generation), and 95 (agriculture in the province, and immigration into the province)) are – exceptionally – assigned to both orders of government (*IAA Reference* at para 112).
- 4) Legislative authorities (heads of power) differ in their nature and scope. Consequently, the extent to which a power may be used to address environmental concerns varies from one power to another. Some heads of power relate to activities, others relate to resources, some cover both resources and activities depending on the situation. These distinctions may serve as convenient descriptors even if they do not fully explain the scope of the head of power (*IAA Reference* at paras 123 – 127).
- 5) Projects primarily subject to provincial jurisdiction (often referred to as “provincial projects”) are *not immune* or *otherwise shielded* from valid federal legislation. But where an activity is primarily regulated by one level of government, legislation aimed at the same activity by the other level should be tailored to those aspects falling within its jurisdiction (*IAA Reference* at para 128).

Jurisdiction with Respect to Impact Assessment after the *IAA Reference*

In this part, we set out the rules that apply to federal impact assessment post-*IAA Reference*.

- 1) Both federal and provincial governments have the constitutional authority to enact impact assessment regimes (*IAA Reference* at paras 2, 7).

- 2) Parliament *can* rely on a presumptive project list (i.e., a list of projects that brings them within the ambit of the legislation). This project list *can* include projects wholly within – and primarily regulated by – a province, such as an oil sands mine or a highway, if they are likely to cause effects with respect to which the federal government may properly legislate. These effects need not be certain at this listing stage. The logic of impact assessment as a planning tool, coupled with the precautionary principle, allows the designation of projects on the basis of their potential effects (*IAA Reference* at paras 141 – 146).
- 3) When deciding whether an impact assessment should be required (known as a screening decision), the potential for adverse federal effects must be given *primacy* over other considerations (*IAA Reference* at paras 150 – 152).
- 4) Once triggered, the subsequent impact assessment can be comprehensive. There is nothing unconstitutional about the current scope of assessment under the *IAA* regime, including the list of factors relevant to assessment under section 22 of the *IAA*. At the assessment stage, it does not matter whether the project being assessed falls primarily under federal or provincial jurisdiction (*IAA Reference* at paras 157, 160, 161).
- 5) At the decision-making stage, the nature of the relevant federal heads of power does matter. Where federal activities are concerned (e.g., an interprovincial railway or a pipeline), the decision maker can make an integrated decision that considers both adverse federal effects and non-federal effects as contemplated in the *IAA* as it stands. Hence, the decision could be based “on a variety of environmental and socio-economic concerns, including a general concern for sustainability” (*IAA Reference* at para 173). However, where jurisdiction over a resource is concerned, the decision must stay focused on the effects of the project or activity on that resource (e.g., fish and fish habitat) (*IAA Reference* at paras 162 – 178). We have more to say about this aspect of the decision below.
- 6) Parliament does not currently possess broad jurisdiction over interprovincial pollution, nor has it established broad jurisdiction over greenhouse gas (GHG) emissions. Prior jurisprudence has recognized (i) marine pollution by ocean dumping, (ii) pollution of interprovincial rivers, and (iii) minimum national standards for carbon (GHG) pricing as matters of national concern pursuant to Parliament’s residual power to enact laws for the “peace, order and good government” (POGG) of Canada under the *Constitution Act, 1867*. Parliament must comply with the revised test as set out in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) (*References re GGPPA*) in order to establish a new matter of national concern (*IAA Reference* at paras 182 – 189).
- 7) Parliament may, for practical purposes, temporarily prohibit proponents from causing any impact or change to aspects of the environment falling within federal jurisdiction, such as fisheries, navigation and shipping, migratory birds, and Indigenous peoples and lands reserved for them (i.e. during the planning and assessment phases). However, these prohibitions are too broad to be permanent (i.e., where a negative public interest

determination with respect to the project is made). Where jurisdiction over fisheries, Indigenous peoples, and migratory birds are concerned, any permanent prohibitions must be aimed at preventing harm (or adverse effects) (*IAA Reference* at paras 190 – 203).

The IAA’s Constitutional Defects, Implications, and Remedies

The majority held that the *IAA* was unconstitutional for two overarching reasons (*IAA Reference* at para 6). First, it was insufficiently focused on environmental effects within federal jurisdiction: both the screening and decision-making phases needed to be more tightly tethered to such effects (at paras 150, 177 – 178). Second, the definition of “effects within federal jurisdiction” was too broad, in that it included interprovincial effects not currently recognized as matters of national concern, and it resulted in impermissibly broad permanent prohibitions where a negative project decision was made (*IAA Reference* at paras 184 – 189).

In our view, with the exception of the decision-making phase, it seems fairly clear how the federal government can address the concerns identified by the Court. It should not be difficult for Parliament to amend the screening provisions to ensure that adverse federal effects are given primary consideration, which Canada argued was its practice anyway (*IAA Reference* at para 152) (see e.g., subsection 8(2) of the *Canada National Parks Act*, [SC 2000, c 32](#), where “ecological integrity” is the primary consideration in parks management). Similarly, it should be relatively easy to amend the potentially permanent prohibition in section 7 of the *IAA* from prohibiting “any change or impact” to prohibiting harm or adverse effects.

With respect to GHG emissions or a general jurisdiction over projects’ transboundary impacts, Canada did not argue that it was relying on these as a basis for anchoring federal jurisdiction over major projects (*IAA Reference* at para 187). In our view, this was a missed opportunity to develop this area of the law, but the majority has not completely shut the door on the possibility that a more fully developed argument to the effect that transboundary impacts, appropriately circumscribed, might fall within a new category of national concern. The federal government will now have to consider whether it is prepared to make that case and defend it in subsequent litigation.

Amendments to the decision-making phase may prove the most difficult to the extent that, with respect, we have some difficulty following the majority’s reasoning. For example, the majority seems to suggest, in a first scenario, that where the federal government considers that a project (e.g., a mining project) with federal adverse effects (e.g., on fish and fish habitat) is still in the public interest, the federal government will clearly be able to impose terms and conditions “aimed at protecting the fisheries through mitigation measures, follow-up programs, and any other conditions that the Minister considers appropriate” (*IAA Reference* at para 171). On the other hand, in a second scenario, should the federal minister conclude that adverse effects on fisheries were not in the public interest, the majority seems to suggest that a federal decision to reject such a project would somehow be impermissible on the basis that the government would somehow be making a decision about the overall sustainability of the project. We may not have captured the majority’s reasoning in framing this particular point, so here is the relevant paragraph:

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

With respect, this seems backward. The starting position must be that the federal government is entitled to conclude that the project’s impacts to fisheries and aquatic species are not in the public interest. Such an outcome is surely constitutional; indeed, the current *Fisheries Act*, [RSC 1985, c F-14](#) generally prohibits the harmful alteration, disruption, or destruction of fish habitat (at section 35) as well as the deposit of deleterious substances in waters frequented by fish or any place where it may enter such waters (at section 36). Such impacts can be authorized by the Minister or through regulations, but neither the Minister nor Cabinet are under any obligation to do so. Arguably, the next closest decision from the perspective of fisheries protection is to only accept such impacts when they will be mitigated to the extent possible and any residual effects (*i.e.* those that cannot be mitigated) are deemed to be worth it, which is to say for projects deemed to be of the greatest value. While some governments may privilege short-term economic gains over long term sustainability, we suspect that others might not, and we are inclined to agree with the dissent on this point (*IAA Reference* at para 333).

Another critical missing piece from this part – and indeed most of the opinion – is a proper treatment of section 91(24) (“Indians and Lands reserved for the Indians”). This head of power is not in relation to either a resource or an activity. It is legislative authority in relation to (1) Indigenous peoples, a “primary constitutional responsibility for securing the welfare” of Indigenous peoples (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997 CanLII 302 \(SCC\)](#), at para 176, as cited in the *IAA Reference* at para 196) and (2) lands reserved for Indigenous peoples (which includes all lands held under an Indigenous title: *Delgamuukw* at paras 174 – 178). Our colleague Robert Hamilton is preparing a post on this aspect of the decision.

The majority was quick to distinguish decision-making in relation to an activity from decision-making in relation to a resource, the former being comprehensive while the latter is not. Here the majority seems to be attracted, but perhaps not completely, to Kennett’s theory of comprehensive and restricted environmental jurisdiction: Steven A. Kennett, “*Oldman* and Environmental Impact Assessment: An Invitation for Cooperative Federalism” (1992), 3 Const Forum 93, as cited at para 116). However, the majority said nothing about what a focus on federal effects means when *multiple* resources falling under federal jurisdiction (e.g., navigable waters, fisheries,

interprovincial rivers, and migratory birds) are affected, as well as Indigenous peoples. As a matter of logic, the more numerous the adverse federal effects, the more constitutionally permissible it would seem to consider the desirability of a project *qua* project.

In summary then, and in broad terms, the *IAA Reference* suggests that the constitutional “sweet spot” for federal impact assessment is somewhere *between* the former *Canadian Environmental Assessment Act, 2012*, [S.C. 2012, c. 19](#) regime and the *IAA* regime as it exists now.

Looking Ahead: Clean Electricity Regulations and an Oil and Gas GHG Emissions Cap

From one perspective, the *IAA Reference* has little direct bearing on the constitutionality of the proposed [Clean Electricity Regulations](#) and the planned oil and gas GHG emissions cap regulations. This is because the federal government appears to be relying on an entirely different federal head of power for these proposed regulations: section 91(27) – the criminal law power. Contrary to some [political rhetoric](#) however, this does not mean that these regulations will form part of Canada’s *Criminal Code*, [RSC, 1985, c C-46](#). Rather, the Supreme Court has long since recognized that section 91(27) refers to the criminal law in a broad sense. Consequently, this head of power has been used to uphold various laws and regulations, including prohibitions on tobacco advertising (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995 CanLII 64 \(SCC\), 100 CCC \(3d\) 449](#)), the sharing of genetic information (*Reference re Genetic Non-Discrimination Act*, [2020 SCC 17 \(CanLII\)](#)), and the “toxic substances” regimes under the *Canadian Environmental Protection Act, 1999*, [SC 1999, c 33](#) (*R v Hydro-Québec*, [1997 CanLII 318 \(SCC\), 118 CCC \(3d\) 97](#)) (the latter acknowledged by the majority in the *IAA Reference* at para 126). The conservative government of former Prime Minister Stephen Harper designated GHG emissions as toxic substances under that regime, and both the Federal Court and Federal Court of Appeal have since upheld the constitutionality of subsequent Renewable Fuels Regulations, [SOR/2010-189](#), which imposed a minimum content of renewable fuel in order to reduce GHG emissions, on the basis of the same federal statute (see *Synchrude Canada Ltd v Canada (Attorney General)*, [2016 FCA 160 \(CanLII\)](#)). It is also this head of power that supports many existing federal GHG emissions regulations, such as those focused on vehicle emissions and coal-fired power pollution.

From another perspective, both the tone and substance of the *IAA Reference* are at least indirectly relevant. In terms of tone, and like Justice Claire L’Heureux-Dubé before him (see *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, [2001 SCC 40 \(CanLII\)](#)), Chief Justice Wagner’s majority reasons have reaffirmed the importance of federalism and the constitutional division of powers. Substantively, however, the majority’s overarching framework for environmental jurisdiction and its re-affirmation of the double aspect doctrine, whereby the same fact situation or activity can be subject to both federal and provincial legislation, does permit a federal role focused on – or tailored to – reducing GHG emissions in sectors otherwise primarily regulated by the provinces.

The majority concluded by inviting “Parliament and the provincial legislatures to exercise their respective powers over the environment harmoniously” (*IAA Reference* at para 216). In light of the chasm between Alberta and the federal government with respect to the imperative of reducing GHG emissions, as well as the hyperbole and misinformation that followed the release of this reference decision, we suspect that more court battles loom ahead. In the meantime, we look

forward to seeing the amendments that the federal government will introduce to bring the *IAA* regime into line with the majority opinion, and what those amendments reveal about the government’s understanding of the majority’s opinion with respect to the decision-making stage of the legislative scheme.

In the interests of disclosure, Martin Olszynski was co-counsel for WWF Canada, while David Wright was co-counsel for the Canadian Association of Physicians for the Environment (CAPE), both of which intervened in support of the IAA before the Supreme Court.

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