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The Proposed Co-operation Agreement on Environmental and Impact Assessment between Canada and Alberta

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On March 6, 2026 the Governments of Canada and Alberta released a draft co-operation agreement on "Environmental and Impact Assessment", thereby leading the way to fulfilling one of the undertakings contained in the Memorandum of Understanding on Energy (MOU) signed by the two governments on November 27, 2025. The MOU committed the parties to "Negotiate a cooperation agreement on impact assessments on or before April 1, 2026, that reduces duplication through a single assessment process that respects federal and provincial jurisdictions." The Draft Agreement is open for comment until March 26, 2026.

While the MOU might have anticipated this particular proposed agreement, there is nothing new about this type of agreement. At one time such agreements were a routine part of intergovernmental relations in the environmental sphere. The website of the Impact Assessment Agency of Canada (IAAC or Agency) contains an historical listing of such agreements under successive federal environmental impact assessment statutes. For example, Canada and Alberta negotiated the Agreement on Environmental Assessment Cooperation in 2005 under the terms of the *Canadian Environmental Assessment Act, 1992* but there was no such agreement between the two governments under the terms of *Canadian Environmental Assessment Act, 2012*.

Canada has also been actively negotiating another generation of cooperation agreements with other provinces at least loosely under the auspices of the current *Impact Assessment Act*, SC 2019, c 28. One of these agreements (with British Columbia) predates the *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII) (*IAA*) and the subsequent amendments to the *IAA*: SC 2024, c 17 (and for comment see David Wright, "Constitutional Caution, Correction, and Abdication: The Proposed Amendments to the Impact Assessment Act") but Canada has also negotiated a raft of agreements with other provinces in the last four months with Ontario, Nova Scotia, New Brunswick, Manitoba and Prince Edward Island. As an aside, the Agency's collation of these agreements also includes hyperlinks to the comments received on each agreement during the 21-day consultation period – useful resources for those thinking of submitting comments on the Alberta/Canada draft. Similarly, the Agency's site also provides a link to a background paper "'One project, one review,' Co-operation Agreements for the Assessment of Major Projects", (September 2025, "Background Paper") along with links to the many comments received on that paper. That paper, discussed below, informs the content of the current raft of agreements. Finally, the political impetus for these more recent agreements can be traced to the May 2025, Speech from

the Throne in which the federal government committed to reach cooperation agreements with every interested province and territory to realize the goal of "one project, one review" (at 12 of the pdf). That speech also contained this commitment: "As Canada moves forward with nation-building projects, the Government will always be firmly guided by the principle of free, prior, and informed consent." (at 17 of the pdf)

The Background Paper

The Background Paper identified three principal means for achieving the goal of "one project, one review": (1) early assessment decisions, (2) substitution of a provincial assessment for the *IAA* assessment (hereafter "substitution"), and (3) substitution to a harmonized process.

Early assessment decisions

The reference to early assessment decisions refers to the decision that the Agency must make under s 16(1) of the *IAA* once the proponent of a designated project has provided an initial project description (IPD) and there has been an opportunity for public comment. "Designated projects" are listed and defined in the Physical Activities Regulations, SOR/2019-285 including, for example (s 18) "The construction, operation, decommissioning and abandonment of … a new coal mine with a coal production capacity of 5 000 t/day or more". This would include, for example, the latest iteration of the Grassy Mountain Coal project of Northback Holdings.

The information that a proponent of a designated project must provide as part of an IPD is prescribed in Schedule 1 of the Information and Management of Time Limits Regulations, SOR/2019-283. Part E of that Schedule requires the proponent to provide information about the potential effects of the project on areas within federal jurisdiction including fish and fish habitat, aquatic species listed under the *Species at Risk Act*, SC 2002, c 29, migratory birds, interprovincial waters, greenhouse gas emissions and potential impacts on Indigenous peoples.

Based on the information in the IPD, the Agency must decide whether an impact assessment of the designated project is required in light of the factors listed in s 16(2) of the *IAA*. Of those factors, the Background Paper draws attention to one particular factor, namely item (f.1), added in the 2024 amendments to the Act, to the effect that the Agency should consider:

> … whether a means other than an impact assessment exists that would permit a jurisdiction to address the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that may be caused by the carrying out of the designated project. (*IAA*, s 16(2)(f))

The Background Paper commentary suggests that a cooperation agreement might be a way in which the parties could commit

> …to share information early regarding how provincial means could address federal effects and, in appropriate cases, provide for continued IAAC support to the province to:
>
> - ensure adverse effects within federal jurisdiction are addressed in the provincial process, including through use of federal expertise;

- incorporate the perspectives and Indigenous Knowledge of potentially impacted groups;
- carry out Crown consultation obligations;
- integrate permitting considerations into the assessment process to the extent possible to reduce federal permitting timelines; and/or
- develop legally binding conditions related to the adverse effects within federal jurisdiction. (emphasis added) (Background Paper, pdf at 4)

I will refer to this as the "early assessment plus federal protection option". The premise here is that the Agency may decide that a federal assessment is not required, even though the Agency has identified that the project may cause "adverse effects within federal jurisdiction". We will see that this option is reflected in s 1.1. in the Alberta Agreement and in all of the co-operation agreements negotiated to date.

A decision not to require an impact assessment for a designated project takes the project out of the *Impact Assessment Act* which can thus have no further application to the project. In plain terms, it is an early off-ramp from the federal process for a designated project. This makes it difficult to understand how the federal government will be able to use factor (f.1), even if supported by a cooperation agreement, to develop legally binding conditions to address the federal concerns referenced in the Background Paper. Federal leverage is lost once there is a determination that an impact assessment under the *IAA* is not required.

The second means for achieving the goal of "one project, one review" is substitution. Sections 31 – 33 of the *IAA* deal with the concept of substitution. The premise for substitution is that the Agency has decided that a designated project should be subject to an impact assessment under the *IAA*. These sections contemplate that the federal Minister may, on the request of a jurisdiction (here a province), agree to substitute a provincial process for the impact assessment that would otherwise be carried out under the *IAA*. The request must be posted for public comment, and the Minister may only agree to substitution if satisfied that a number of important conditions precedent will be met (s 33). The Background Paper summarizes these conditions as follows:

> For the Minister to approve such a request, the provincial process must address conditions set out in the IAA, including addressing the factors that would be addressed in a federal impact assessment, consulting with potentially affected Indigenous groups, providing an opportunity for the public to participate meaningfully in the assessment and involving federal experts throughout the assessment process. When an assessment is substituted, the federal government would continue to have a decision-making role following the assessment, in setting conditions to address significant adverse federal effects identified through the assessment, including, where appropriate, potential accommodations. (ibid at 5)

The Background Paper notes that substitution has been used relatively frequently in British Columbia. In my view the *IAA* sets clear legal parameters for substitution unlike the "early assessment plus federal protection" referenced in the last section.

The third means for achieving the goal of "one project, one review", substitution to a harmonized process, is evidently a variant on simple substitution. It involves the joint design of a process to meet the needs of both federal and provincial impact assessment rules, and perhaps also those of Indigenous governments. The harmonized approach is expressly permitted by s 31(1)(b) of the *IAA* which contemplates a project specific agreement or arrangement under s 114 of the Act. Any agreement to adopt such an approach would also require the minister to satisfy themself that the agreed approach will meet the same preconditions as for simple substitution. Accordingly, I am of the view that the *IAA* once again sets clear legal parameters for "substitution to a harmonized process".

Finally, the Background Paper references possible additional content for a co-operation agreement including joint review panels (JRP), such as that put in place by Alberta and Canada for the original Grassy Mountain project. However, while some co-operation agreements reference JRPs (e.g. New Brunswick, Manitoba, Nova Scotia and Prince Edward Island) there is no reference to a JRP in either the Ontario or the Alberta agreements.

The next section of this post provides an outline of the Canada/Alberta Agreement as well as some comparisons between this Agreement and of the other provincial agreements. The concluding section assesses the legal significance of the Canada/Alberta Agreement.

The Draft Canada/Alberta Agreement

The Agreement comprises a preamble (11 paragraphs) and 12 operative sections. Unlike earlier generations of impact assessment cooperation agreements, there is no definition section in any of these agreements.

The Preamble

The Preamble begins by referring to the Energy Memorandum of Agreement (although the Agreement is not confined to energy projects) and then offers a statement of the exclusive legislative powers of the province largely tracking language found in ss 92 and 92A of the *Constitution Act, 1867*. There are similar preambular statement in the other cooperation agreements, although the Alberta version, perhaps not surprisingly, emphasises the word "exclusive" (see my earlier post with Andrew Leach on this point). The Alberta agreement also offers a more expansive statement of provincial powers than the other agreements. Conspicuously absent from all of these agreements is a statement of the legislative jurisdiction of the federal government. Hence, although the agreements all recognize a shared responsibility for the environment, none of them articulate the bases for federal jurisdiction. The preambles of these agreements are therefore somewhat one-sided.

In common with all the other agreements, the preamble to the Alberta agreement contains several references to the rights of Indigenous peoples, including references to the duty to consult and accommodate and the goal of reconciliation. Most telling however is the manner in which the Agreement deals with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Whereas the Preamble states that Canada maintains its commitment to UNDRIP, Alberta insists that it "continues to act in a manner that is consistent with treaties, the Canadian

Constitution, and Alberta law, and views UNDRIP as non-binding". It is hard for me to accept that this self-serving statement belongs in the Preamble. In particular, Alberta's views as to the legal status of the Declaration are demonstrably wrong, at least with respect to those (many) elements of the Declaration that represent customary international law: *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 (CanLII).

Alberta's position is certainly unique in the context of the other agreements. Manitoba and Canada share the commitment "to ensuring that processes are informed by, and aligned with the principles" of UNDRIP while the provincial parties to the Ontario, New Brunswick and PEI agreements take no position on UNDRIP. Nova Scotia is more nuanced and less self-serving than Alberta:

> Nova Scotia advances Indigenous-Crown relations in accordance with existing Aboriginal law and Section 35 of the *Constitution Act, 1982* and has made no legislative commitment to implement UNDRIP and does not apply it as law.

The preamble also contains the assertion that:

> Canada and Alberta have each established robust processes for the high-quality assessment of the effects of certain types of projects, informed by rigorous science, Indigenous consultation, public participation, and community knowledge;

Many would contest elements of this assertion as it applies to Alberta's project review process, and in particular the way Alberta's process privileges participation by a narrow category of persons considered to be "directly affected", thereby excluding many elements of civil society. See, for example, the decision of the chief executive officer of the Alberta Energy Regulator to cancel a public hearing on a significant coal mine expansion project, post here. First Nations have also critiqued the adequacy of Alberta's impact assessment and regulatory processes. See for example the request in 2024 by a number of Nations for the designation of the Pathways CO2 Transportation Network and Storage Hub Foundational Project, esp at 13 – 20 and an ABlawg post by Nicole Achtymichuk and Shaun Fluker here. Furthermore, the recent decision in the Rosebud Racetrack case (*Skibsted v Alberta (Environment and Protected Areas)*, 2026 ABKB 98 (CanLII) confirms that provincial decision-makers are very reluctant to concede the relevance and significance of federal listing decisions under the *Species at Risk* Act, SC 2002, c 29 when it comes to discharging their responsibilities under provincial environmental legislation.

Substantive Provisions

The following are the headings for the substantive sections of the Alberta and Ontario Agreements. My selection of the Ontario Agreement for comparison purposes is somewhat arbitrary. While the agreements share many commonalities, the headings also suggest some differences, which I explore in the next sections.

Ontario	**Alberta**

1. One Project, One Assessment, & One Decision: Reliance on Ontario's Processes & Reciprocity	1. Reliance on Alberta's Processes and Reciprocity
2. Early Notification and Information Sharing	**2. Early Notification and Information Sharing**
3. Decision-making about the conduct of a federal impact assessment	3. Decision-making about the conduct of a federal impact assessment
4. Substitution to Ontario's process or a harmonized process	4. Co-operative assessments
5. Co-ordination of Potential Assessment conditions & decision-making and permitting	5. Timeline for completion of impact assessment
6. Indigenous peoples	6. Co-ordination of Potential Assessment conditions & decision-making and permitting
7. Information sharing & communications	7. Indigenous peoples
8. Resources	8. Information sharing & communications
9. Participant funding	9. Participant funding
10. Application of this agreement	10. Application of this agreement
11. General provisions	11. Issues management
12. Review	12. General provisions

I will focus here on the following provisions: the common s 1 on the reliance on provincial processes; the common s 3 on the decision to conduct a federal impact assessment; and the substitution (s 4 (Ontario) and co-operative assessments provisions (s 4 (Alberta)).

Reliance on provincial processes, no impact assessment required

In each case, s 1(1) sets the tone for the entire agreement and there are no material differences between the Ontario and Alberta agreements. Here is the Alberta provision:

> When a proposed project is primarily within provincial jurisdiction, Canada will recognize Alberta as best placed to undertake an assessment and will rely on Alberta's environmental assessment or regulatory processes to assess the effects of the project <u>including, as applicable, to address adverse effects within federal jurisdiction, as defined in the IAA</u>, as outlined in this Agreement. (emphasis added)

I note that this language has evolved from some of the earlier agreements and now more stridently reflects a provincial perspective. Here, for example, is the opening section from the Prince Edward Island Agreement:

> When a proposed project is primarily <u>a provincial undertaking</u>, Canada <u>is committed to relying</u> on Prince Edward Island's applicable environmental assessment and regulatory processes for the assessment of the adverse effects within federal jurisdiction of a proposed project, <u>to the greatest extent possible</u>. (PEI Agreement s 1(1), emphasis added to highlight some of the key differences between the two agreements)

The opening phrase "a proposed project [that] is primarily within provincial jurisdiction" is not defined in any of agreements but reference to s 1(2) of the agreements suggests that the parties likely intend that the term should be interpreted as everything other than interprovincial works or undertakings (although some of the agreements such as those with New Brunswick, Manitoba and Prince Edward Island, add to this other matters such as ports and nuclear projects) unless the project takes place on federal lands.

> 1(2) When a proposed project is or includes a federal work or undertaking or is on federal land Canada commits to integrating Alberta's environmental assessment and regulatory process requirements into the federal assessment, if applicable and desired by Alberta, as outlined in this Agreement.

The terms used in the balance of s1(1) of the Alberta agreement are startling in their absolutism and the absence of provisos: (1) *Canada will recognize* that Alberta is best placed to undertake, and (2) *Canada will rely* on Alberta's process to assess adverse effects within federal jurisdiction. The implications of this are massive. At the very least, it represents a clear political assertion that all future oilsands projects and coal mines should be subject to a provincial assessment to the exclusion of the federal assessment. Recall that this is the premise of option one described in the Background Paper, the early assessment plus federal protection option. The legal hook for implementing this option is 16(2)(f.1) of the *IAA*. I will have more to say about this in the final section of the post.

Section 3(1) of the Alberta agreement "Decision-making about the conduct of a federal impact assessment" builds upon s 1(1) and commits the IAAC to avoid

> … duplicative decision-making processes related to assessments by relying on the provincial environmental assessment or regulatory processes <u>in circumstances where Alberta confirms that those processes will address the adverse effects within federal jurisdiction</u> … of projects that are primarily regulated by Alberta and/or there is a means other than impact assessment to address such effects, when making decisions about such projects as is reasonable after taking into account the factors under sections 9 and /or 16 of the IAA. (emphasis added)

While in this case the IAAC's commitment to avoid duplication is conditional, it is still startling to read that the condition depends upon the <u>province's</u> assessment that <u>the province</u> can handle the adverse effects within federal jurisdiction. This is especially problematic in light of criticisms as to the adequacy of the provincial impact assessment and regulatory processes as discussed above in the context of the preamble.

It is also startling when one compares this provision in the Alberta agreement with some of the earlier agreements, such as the Prince Edward Island agreement. The similar clause in that agreement is far less deferential to provincial interests and offers detailed guidance to ensure the protection of federal interests. The directions include, for example, the development of:

> … legally binding conditions in relation to the adverse effects within federal jurisdiction, including mitigation measures and follow-up program requirements, with which the proponent must comply. (PEI Agreement, s 3)

Substitution and substitution to a harmonized process

Let us assume that early decision-making has not resulted in the termination of the federal assessment process i.e. notwithstanding Canada's commitment in s 1.1, the Agency has made the determination that an impact assessment is required. At this point recall that the Background Paper identified two possible options that will leave the province in the driving seat, substitution and substitution to a harmonized process. While all of the other agreements refer to one or both of these substitution options, the word "substitution" is not even mentioned in the Alberta agreement.

Before looking at how the Alberta agreement deals with these issues, I will examine the Ontario agreement. The Ontario agreement deals with both options together in s 4 entitled "Substitution to Ontario's process or a harmonized process". Section 4(1) of the Agreement indicates that Ontario will endeavour to assess whether it wishes to trigger either s 31(1) (a) or (b) of the *IAA* no later than 10 days after IAAC has made its s 16 determination. Section 4(2) of the Ontario Agreement addresses how such a request will address federal concerns:

> (2) The request would confirm how the provincial assessment process on it own, or together with an arrangement between IAAC and [the relevant provincial authority], will meet the requirements of subsection 33(1) of the IAA. Such arrangement would document the roles, responsibilities, activities and timelines that will lead to a single assessment process that meets the legislative requirements of both Parties for the assessment of effects of the project and would constitute an arrangement for the proposed project pursuant to subsection 114(1)(f) of the IAA, as required under subsection 31(1)(b) of the IAA.

In my opinion, the approach in the Ontario agreement tracks the provisions of the *IAA* quite closely. It also anchors the details of any additional implement arrangement in s 114 of the Act. I refer to s 114 agreements in more detail in the final section of this post. I am not in a position to assess whether s 4(2) does the same for Ontario's assessment legislation.

Finally, s 4(3) addresses the implications of substitution for the duty to consult affirming that each party will "retain the responsibility to ensure that the duty to consult and, where appropriate, accommodate Indigenous Peoples has been satisfied."

The Ontario agreement builds on this solid statutory foundation in s 5 "Co-ordination of Potential Assessment conditions & decision-making and permitting" which, as the title suggests, is designed to address co-ordinated decision-making at "the conclusion of a substituted or harmonized assessment". The parties will work together to "minimize duplication and regulatory burden" to the extent possible seek to align such matters as "descriptions of the applicable project, reporting and notification requirements, terminology and definitions, and deadlines …". (s 5(1)).

As noted above, the Alberta agreement does not even mention substitution. Instead, the agreement adopts (s 4) a more general statement of "Co-operative Assessments".

> Notwithstanding clauses 1(1) and (2), in the event both federal and provincial assessments may apply to a proposed project, the parties are committed to avoiding duplicative processes. In such circumstances IAAC and the applicable Alberta Regulator will develop an arrangement, including roles, responsibilities, activities and timelines that would lead to a single assessment process that would meet the legislative requirements of both jurisdictions. The proposed arrangement will be reviewed and considered by the President of IAAC and the Deputy Minister-level head of the relevant Alberta Regulator.

In my opinion, this provision is far too general. It fails to ground the co-operative process within the text of the *IAA* and instead promises that any implementing "arrangement" will meet the legislative requirements of either jurisdiction. The clause does not address the duty to consult issues but the Agreement returns to this in s 7 of the Alberta agreement, "Indigenous Peoples" which provides in part that "Canada will recognize Alberta as best placed to consult with Indigenous Peoples … in relation to the effects of relevant provincial decisions on the rights of Indigenous peoples" at least where "a proposed project is primarily within provincial jurisdiction". Unlike the Ontario agreement however, this section fails to address how the duty to consult will be addressed in the context of federal powers. Each Crown or order of government is responsible for the duty to consult and accommodate with respect to decisions that fall within its jurisdiction that may affect Indigenous rights. While the Crown may delegate the administrative aspects of the duty to consult to others (e.g. corporations or even another order of government) it cannot delegate the duty to satisfy itself that it has met its obligations with respect to its own powers: *Squamish Nation v British Columbia (Environment),* 2019 BCCA 321 (CanLII). Reliance on Alberta's consultation efforts is perhaps even more suspect given ongoing litigation challenging the adequacy of Alberta's approach to consultation more generally: see *Mikisew Cree First Nation v Alberta*, 2025 ABCA 304 (CanLII).

The Alberta agreement contains a co-ordinated decision-making clause which has similar content to that of the Ontario agreement, but, because the Alberta agreement refuses to use the language of substitution, it lacks a clear starting point in a unified process. Instead of beginning with "at the conclusion of a substituted or harmonized" it begins with a different premise:

> 6(1) In the event that both federal and provincial assessments apply to a proposed project, IAAC and the applicable provincial public interest decision-maker or regulatory approval decision-maker(s) …. (emphasis added)

In my opinion, the failure to locate a joint approach within the text of the *IAA* will lead to additional regulatory uncertainty, one of evils that these co-operation agreements are designed to address. Indeed, it makes s 6 incoherent insofar as its premise is parallel federal and provincial processes: "In the event that both federal and provincial assessments apply …".

It is hard to say why the Alberta agreement declines to anchor the agreement within *IAA* text. Perhaps it has something to do with Alberta's second reference case challenging the validity of the *IAA* on the basis that the 2024 amendments (SC 2024, c 17) did not go far enough. But any concerns of the province that specific references to *IAA* provisions might perhaps constitute provincial

endorsement of the federal legislation are surely adequately addressed by another provision in the agreement:

> The Parties acknowledge that Alberta is challenging the constitutionality of the IAA, which is a matter before the courts. By entering into this Agreement, Alberta does not acknowledge the IAA is constitutional. (s 10(2))

The Legal Significance of the Alberta/Canada Cooperation Agreement

It is useful to begin with some basic principles about intergovernmental agreements.

Intergovernmental Agreements: Basic Principles

Intergovernmental agreements are a routine part of the machinery of cooperative federalism. For an annual listing of Alberta's intergovernmental agreements see: Inventory of International and Intergovernmental Agreements. Governments are free to enter into intergovernmental agreements without legislative sanction unless the jurisdiction has enacted more specific requirements. For Alberta see *Government Organization Act*, RSA 2000, c G-10, s 11. An intergovernmental agreement may be binding or non-binding, depending upon any governing legislation and depending also on whether the agreement evinces an intention to create legal relations. An intergovernmental agreement cannot change the law, or create rights and obligations for third parties, unless the agreement has been ratified by statute and the statute confers objective legal effect on the agreement (e.g. a provision to the effect that "the agreement scheduled to this Act takes effect as if enacted in this Act"): *Northrop Grumman Overseas Services Corp. v Canada (Attorney General)*, 2009 SCC 50 (CanLII), at para 9). But even when non-binding, an intergovernmental agreement may represent a statement of policy that forms part of the context for interpreting and informing the reasonable exercise of discretionary powers. There is an important proviso to this proposition however: the agreement must not fetter the discretion of a statutory decision-maker.

Application of the Principles to the Canada/Alberta Agreement

As noted above, governments may freely enter into intergovernmental agreements at the executive level unless somehow restricted by statute. The question for present purposes (and focusing on the federal side of things) is whether there is anything in the *IAA* that restricts Canada from entering into an agreement such as the Canada/Alberta agreement, specifically provisions such as s 1(1) and ss 4 and 6.

Authority for the Agreement

The *IAA* provides the Minister with broad authority to enter into agreements with provinces with respect to impact assessment. Specifically, s 114(1) empower to Minister to:

> (c) enter into agreements or arrangements with [inter alia a province] …. respecting assessments of effects;

…

(f) enter into agreements or arrangements with any jurisdiction for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the effects of designated projects of common interest;

This section does not tell us about the legal effect of these agreements, but s 114(1)(f) is cross-referenced several times in s 33(1) - the section of the Act that establishes the minimum condition for substitution or harmonized assessment. S 33 is thus a more specific provision addressing how Ministerial agreements under s 114 may be used.

The question for present purposes is whether ss 33 and 114 read together provide a complete code for co-operative assessments - and agreements relating to the same. It can be argued that these sections channel intergovernmental harmonization agreements towards substitution and harmonized assessment, and establish conditions for those arrangements. The Ontario agreement observes this channeling; the Alberta agreement does not. Instead, s 4 of the Alberta agreement, "co-operative assessments", is much more general, and, as I have repeatedly observed, fails to even mention substitution. In that sense it looks like an attempt to do an end run around ss 31 and 33 of the *IAA*. The answer to that may be that the conditions referenced in these sections, and in particular s 33, would necessarily have to be included in any cooperative arrangement negotiated under s 4, but the absence of any specific reference to the anchoring provisions of the *IAA* is troubling.

Fettering the Discretion of a Statutory Decision-Maker

There is a general principle of administrative law that discretionary powers must be exercised by the statutory delegate on whom the power is conferred. A delegate that fails to exercise that discretion independently (perhaps because of a ministerial direction) acts unlawfully, or to put the point in more modern terms, makes a decision that is prone to review on reasonableness grounds: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII),– see esp at para 108, *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII) at paras 32 et seq. and *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 (CanLII) at para 24). Section 153(2) of the *IAA* provides that while the Minister is responsible for the Agency "The Minister may not, except as provided in this Act, direct the President of the Agency or its employees, or any review panel members, with respect to a report, decision, order or recommendation to be made under this Act."

The question for present purposes therefore is whether the Agreement, or specific provisions of the Agreement, can be construed as an unlawful fettering of discretionary powers vested in the Agency (or some other statutory decision-maker) by the *IAA*. Alternatively, can any of the provisions of the Agreement be construed as an unlawful direction by the Minister under s 153(2) of the *Act*.

Rather than considering all of the provision of the Agreement, I will focus attention on s 1(1) of the Agreement given the central role that this provision may play in ensuring that a federal impact assessment may not be required. Here, once again, is the text of s 1(1):

> When a proposed project is primarily within provincial jurisdiction, Canada will recognize Alberta as best placed to undertake an assessment and will rely on Alberta's environmental assessment or regulatory processes to assess the effects of the project including, as applicable, to address adverse effects within federal jurisdiction, as defined in the IAA, as outlined in this Agreement.

The Agreement does not provide an express statutory anchor for this provision, but if one reads this section in the context of the Background Paper, it makes sense to connect this commitment ("Canada will recognize") to the power and duty of the Agency under s 16(1) of the Act to determine whether an impact assessment of a designated project is required. In making that determination, the Agency is directed to take account of a non-exhaustive list of factors, including a factor added in the 2024 amendments to the Act, namely s 16(2)(f.1):

> (f.1) whether a means other than an impact assessment exists that would permit a jurisdiction to address the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that may be caused by the carrying out of the designated project

The question for present purposes is whether s 1(1) effectively fetters the Agency's discretion or whether it can be interpreted as a direction (not authorized by the statute) to given additional weight to one among a number of different relevant considerations.

Any evaluation of this argument needs to take account of the "no-fettering" provisions in the Agreement i.e. provisions that are designed to say that "although such and such a clause may look like an attempt to fetter a discretionary power you are not allowed to read it that way."

There are two such "no-fettering" provisions in the Alberta agreement. The first is a general "no fettering" provision in s 10, "Application of this Agreement". This provision has been included in all of the co-operation agreements concluded to date:

> 10(3) This Agreement does not create or alter any power or duty under any enactment of Canada or Alberta and is not intended to direct or fetter the exercise of such powers or duties.

The second such provision is found in s 11, titled "Issues Management" (a very "Alberta" title I think). This provision, effectively a dispute settlement clause, concludes with the following statement:

> IAAC and the applicable Alberta Regulator recognize that this issue management process does not fetter the authority of IAAC under the IAA or of Alberta under the EPEA.

It is somewhat curious that the purported "recognition" represents the recognition of the IAAC and the applicable Alberta Regulator – neither of which is a party to the Agreement.

While such clauses may offer some cover to a provision such as s 1(1), I do not think that a court would regard them as conclusive. Nor will such clauses insulate a 16(1) decision from a searching reasonableness review, and here I note that "The Agency must post a notice of its decision and the reasons for it on the Internet site." (*IAA*, s 16(3)) All that said, it is typically difficult to establish a case of fettering of discretion, particularly in the context of competing policy directions and issues of intergovernmental agreements and co-operative federalism. See, for example, *Moresby Explorers Ltd. v Canada (Attorney General)* 2001 FCT 780 (CanLII). Much may depend on the particular facts and perhaps a pattern of behaviour that involves rote reliance on s 16(2)(f.1). In other words, it will be difficult to attack s 1.1 at the outset on the basis of a fettering argument. Instead, we shall have to wait and see to what extent the section influences Agency decision making over time.

Conclusions

The Background Paper suggests that a central goal of these co-operation agreements is to achieve "one project, one review", which should of course begs the question of when anybody last saw separate (as opposed to joint) reviews of the same project? In fact, the number of federal panel assessments has been declining for years: see Third Report of the Minister's Advisory Council on Impact Assessment (2025). But while the "one project, one review" framing may be a solution to a non-problem, we can perhaps all agree that coordinated assessments of significant projects should be encouraged. In my view, for example, the JRP process for the original Grassy Mountain Project provides an excellent example of a coordinated approach. While neither the proponent nor the provincial government may have liked the result, the JRP report provided a robust assessment that fulfilled statutory responsibilities under both federal and provincial legislation. It was and is a model of co-operation.

But the terms of co-operation for project assessment matters. The Grassy Mountain JRP was a mutually respectful process. The terms of co-operation proposed in the draft Alberta/Canada agreement are not. Instead, the agreement places far too much faith in provincial impact assessment and regulatory processes that many consider to be inadequate - both in terms of substance and rigour and in terms of opportunities to participate. The terms of co-operation must also respect statutory obligations and in this case, the deference that the s 1.1 agreement requires Canada to accord to Alberta's environmental and regulatory processes looks like an abdication of federal responsibility without the means to ensure that Alberta's regulatory processes will protect federal interests. While this same criticism can also be levelled at the co-operation agreements with other provinces, I think it is clear that the draft Alberta agreement takes federal abdication to new heights.

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