THE NEW FEDERAL *IMPACT ASSESSMENT ACT*: IMPLICATIONS FOR CANADIAN ENERGY PROJECTS

DAVID V. WRIGHT*

Implementation of the new Impact Assessment Act *regime is now underway, changing the process for federal assessment of energy projects. While the reformed regime resembles its predecessor in many ways, it also includes many changes, including new requirements with respect to climate change, the rights and interests of Indigenous peoples, sustainability, and economic considerations. Despite much criticism of the* Impact Assessment Act *in public and political realms, implications for energy projects, particularly in Alberta, remain not well understood. It has been unclear, for example, the extent to which the changed federal process will actually affect whether a project is approved or not. This article provides an overview of the new federal regime and examines what it may mean in practical terms for energy projects, with an emphasis on the Alberta context. Particular focus is devoted to changes from the previous federal regime, chiefly with respect to the assessment and final decision-making phases. Overall, the analysis indicates that for the small number of projects that trigger application of the regime, the assessment process is likely to be more onerous but unlikely to result in fewer project approvals. Rather, the new process still provides significant latitude and discretion that will likely see most projects approved, and the more robust assessment process may translate into broader public support.*

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* Assistant Professor and Member of the Natural Resources, Energy & Environmental Law Research Group, Faculty of Law, University of Calgary. The author is grateful to University of Calgary JD student, Niall Fink, for his invaluable research assistance in this project and to Faculty of Law colleagues for their comments on an earlier draft. This research was supported by Canadian Institute of Resources Law with funding from the Alberta Law Foundation.

I. INTRODUCTION

Despite several converging factors contributing to a downturn in Canada's energy sector in recent years,[1] including the crash in global oil prices and an accelerating global trend toward decarbonization,[2] the expansion and development of energy projects[3] is likely to continue for decades, particularly in Alberta. For example, the Alberta Energy Regulator's 2020 Alberta Energy Outlook forecasts modest growth in investment in oil sands and the crude oil and natural gas sectors over the next decade,[4] and a steady increase in total primary energy production and demand in Alberta.[5] One area of uncertainty in this context, and one perceived to potentially affect these projections, is the effect of the new federal impact assessment regime on proposed energy projects.

The new *Impact Assessment Act*[6] came into force in 2019 following a lengthy law reform process that included significant engagement with the public, industry, and Indigenous communities.[7] While the new regime largely retained the structure of its predecessor, the *Canadian Environmental Assessment Act, 2012*,[8] the *IAA* introduced a number of changes and new requirements that are certain to affect whether and how major energy projects are assessed. The extent to which the new regime changes the *outcomes* of those assessments (that is, approval or rejection), however, has remained an unanswered question. Some have asserted that the new *IAA* is one of the factors contributing to the downturn in Canada's

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1 Conference Board of Canada, "Pandemic and Oil Collapse Lead to Surging Deficits: Alberta's Two-Year Outlook" (29 September 2020), online: <www.conferenceboard.ca/temp/ec5b3b05-7eea-4bcb-a773-30c3e4a5a4fb/10802_alberta_2-year-outlook_sep2020.pdf>. See also Aaron Cosbey, Dave Sawyer & Seton Stiebert, "In Search of Prosperity: The Role of Oil in the Future of Alberta and Canada" (May 2021), IISD Report, online: *International Institute for Sustainable Development* <www.iisd.org/system/files/2021-05/search-prosperity-oil-alberta-canada.pdf>; Tony Seskus, "Alberta's Economic Decline Will Be the 'Most Severe' the Province Has Ever Seen: RBC," *CBC News* (26 March 2020), online: <www.cbc.ca/news/canada/calgary/rbc-alberta-economic-forecast-severe-decline-1.551 1032>.

2 Jeff Rubin, "The Future of Canada's Oil Sands in a Decarbonizing Global Economy" (March 2016), CIGI Papers No 94, online: *Centre for International Governance Innovation* <www.cigionline.org/sites/default/files/paper_no.94_web.pdf>. See also Jen Gerson, "After Oil, What's Next for Alberta?" *Pivot Magazine* (4 March 2019), online: <www.cpacanada.ca/en/news/pivot-magazine/2019-03-04-oil-or-nothing>; Benjamin Israel, "For Canadian Oil Companies, Time to Decarbonize Is Running Out" (23 November 2020) online: *Pembina Institute* <www.pembina.org/blog/canadian-oil-companies-time-decarbonize-running-out>; David Olive, "As the World Oil Price Plunges, It's Time for Alberta to Think Outside the Oilpatch," *Toronto Star* (13 April 2020), online: <www.thestar.com/business/opinion/2020/03/14/alberta-has-far-more-to-offer-than-oil-and-gas.html>.

3 The terminology "energy projects" is detailed in Part III below. The primary focus is on include physical activities pertaining to extraction of energy resources (namely, coal, oil and gas), processing and storage of such energy products, transportation of such energy resources (primarily via pipeline), and generation and transmission of electricity.

4 Alberta Energy Regulator, *2020 Alberta Energy Outlook: Executive Summary*, ST 98 (Calgary: Alberta Energy Regulator, 2020) at 8, online: <www1.aer.ca/st98/2020/data/executive-summary/ST98-2020-Executive-Summary.pdf> [AER, *Alberta Energy Outlook*]. See also International Energy Agency, "Canada," online: <www.iea.org/countries/canada>.

5 AER, *Alberta Energy Outlook*, *ibid* at 11, 13. See also Dinara Millington, "Canadian Oil Sands Production and Emissions Outlook (2020-2039)," Canadian Energy Research Institute Study No 191 (August 2020) at 22–24, online: <ceri.ca/assets/files/Study_191_Full_Report.pdf> [Millington, "Oil Sands Outlook"]; Canadian Energy Regulator, *Canada's Energy Future 2020*, Catalogue No NE2-12E-PDF (Calgary: Canadian Energy Regulator, 2020), online: <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2020/canada-energy-futures-2020.pdf> [CER, *Canada's Energy Future*].

6 SC 2019, c 28, s 1 [*IAA*].

7 Environment and Climate Change Canada, "Environmental and Regulatory Reviews" (11 September 2019), online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html> [Environment and Climate Change Canada, "Reviews"].

8 SC 2012, c 19, s 52 [*CEAA 2012*].

energy sector,[9] including claims in the political realm that it amounts to a "No More Pipelines Act."[10] However, to date this claim has gone largely unsubstantiated. This article explores both the changes to the assessment process in relation to energy projects, as well as the question of whether the new process will actually result in fewer projects being approved. Particular attention is devoted to Alberta, given that it is home to Canada's largest energy sector.

Part II examines the new *IAA* regime, providing a high-level overview of the new statute and the law reform process that led to Bill C-69 and the resulting legislation. Part III offers a brief sketch of what "Canadian energy projects" means in the *IAA* context and introduces specific project examples that will illustrate parts of the analysis. Part IV takes a detailed look at the implications of the new regime, with particular emphasis on changes to the planning, assessment, and decision-making phases of the process, including with respect to provisions regarding climate change, the rights of Indigenous peoples, and sustainability. Part V concludes with some synthesis perspectives and reflections.

This analysis yields several important insights. First, changes to the federal regime, and in particular the list of projects triggering application of the *IAA*, mean that fewer projects will be assessed under the new regime compared to its immediate predecessor. Second, the new assessment process is sure to change how energy projects are assessed, with the new assessment phase including several new requirements. Third, for better or worse (depending on one's interests), the *IAA* contains sufficient discretion for most, if not all, future energy projects to be determined to be in the public interest and thus receive approval under the *IAA*. Finally, as time goes on, it may be the case that the new process results in projects that attract broader public support, thus bolstering investor certainty and reducing total time from initiating the assessment process to commencing construction.

II. THE NEW REGIME

A. CONTEXT AND BACKGROUND

The *IAA* came into force in August 2019.[11] The *Act* was preceded by a lengthy and at times contentious law reform process that led to the tabling of Bill C-69 in February 2018,[12] followed by the typical parliamentary hearings and readings, an unprecedented level of

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9 Sarah Rieger, "Alberta's Legal Challenge of Bill C-69 Is Part of a List of Grievances Against Ottawa," *CBC News* (23 February 2021), online: <www.cbc.ca/news/canada/calgary/kenney-madu-impact-assessment-act-1.5924814>.

10 "'A Dark Day for Alberta and Canada', UCP Government Reacts as Bill C-69 Enters into Law," *CTV News Calgary* (29 August 2019), online: <calgary.ctvnews.ca/a-dark-day-for-alberta-and-canada-ucp-government-reacts-as-bill-c-69-enters-into-law-1.4570025> [CTV News, "A Dark Day"]. See also "Alberta Files Constitutional Challenge of Federal Environmental Assessment Process," *CBC News* (10 September 2019), online: <www.cbc.ca/news/canada/edmonton/constitutional-pipeline-alberta-environmental-assessment-1.5278108>.

11 *IAA*, *supra* note 6.

12 Environment and Climate Change Canada, "Reviews," *supra* note 7 (explaining the law reform process and input). See also Maura Forrest, "New Environmental Assessment Process a Compromise Between Industry, Activists," *National Post* (8 February 2018), online: <nationalpost.com/news/politics/government-reveals-far-reaching-new-review-process-for-major-resource-projects> (media coverage outlining some of the tensions in the law reform process).

review by the Senate,[13] and finally royal assent on 21 June, 2019.[14] This law reform initiative followed through on a 2015 Liberal party election campaign commitment to "restore lost protections"[15] by, among other things, reviewing the environmental assessment process with a view to "regaining public trust."[16] More broadly, it was a response to resistance, including the Indigenous-led Idle No More movement,[17] to legislative changes under the previous Harper government that significantly weakened a number of federal environmental laws, including the repealing of the original federal environmental assessment statute, the *Canadian Environmental Assessment Act*,[18] and replacing it with *CEAA 2012*.[19]

While the law reform leading to the *IAA* responded to concerns about the weakening of the federal regime, it also attracted significant criticism from political and industry groups who asserted that the new process would be too onerous, with some characterizing it as "the no more pipelines bill."[20] Throughout the law reform process, individuals and groups expressed concerns about its implications for energy projects.[21] This was taking place at the same time as global oil prices were collapsing, which also fueled concerns about the future of Canada's oil and gas sector.[22] The extent to which concerns about the *IAA* are true or are coming true is an unanswered question that this article seeks to address.

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13 John Paul Tasker, "Federal Government Accepts Dozens of Amendments to Environmental Review Bill, Rejects Most of the Tory Ones," *CBC News* (12 June 2019), online: <www.cbc.ca/news/politics/c69-environmental-assessment-senate-1.5171913>.

14 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*, 1st Sess, 42nd Parl, 2019 (Royal Assent).

15 Liberal Party of Canada, "A New Plan for a Strong Middle Class" (2015) at 41–42, online: <liberal.ca/wp-content/uploads/sites/292/2020/09/New-plan-for-a-strong-middle-class.pdf>.

16 *Ibid* at 41.

17 Idle No More, "About the Movement," online: <idlenomore.ca/about-the-movement/> ("Idle No More started in November 2012, among Treaty People in Manitoba, Saskatchewan, and Alberta protesting the Canadian government's dismantling of environmental protection laws, endangering First Nations who live on the land"). See also Joanna Smith, "Idle No More Protesters, Opposition MPs Keep First Nations Issues on Agenda," *Toronto Star* (28 January 2013), online: <www.thestar.com/news/canada/2013/01/28/idle_no_more_activists_resume_protests_against_conservatives.html>; Jessica Clogg, "Jessica Clogg explains Bill C-45, First Nations Rights, FIPA" (3 March 2013), online: *West Coast Environmental Law* <www.wcel.org/blog/jessica-clogg-explains-bill-c-45-first-nations-rights-fipa>; Derek Inman, Stefaan Smis & Dorothée Cambou, "'We Will Remain Idle No More': The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples" (2013) 5:1 Goettingen J Intl L 251; Karey Brooks, "Legislative Changes to Federal Environmental Laws — Duty to Consult Triggered" (18 January 2015), online (blog): <jfklaw.ca/legislative-changes-to-federal-environmental-laws-duty-to-consult-triggered/>.

18 SC 1992, c 37 [*CEAA* 1995].

19 Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012) 24:1 J Envtl L & Prac [Doelle, "End of Federal EA"]; Robert B Gibson, "In Full Retreat: The Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 Impact Assessment & Project Appraisal 179 [Gibson, "In Full Retreat"]; Liberal Party of Canada, *supra* note 15 at 42 ("Stephen Harper's changes … have weakened environmental protections").

20 CTV News, "A Dark Day," *supra* note 10. See also Stephanie Taylor, "Scheer, Provincial Leaders Slam 'No More Pipelines Bill' at Rally in Rural Saskatchewan," *National Post* (17 February 2019), online: <nationalpost.com/news/canada/conservative-leaders-to-attend-pro-pipeline-rally-in-saskatchewan>.

21 *Ibid*. See also Canadian Association of Petroleum Producers, "CAPP Senate Priority Areas Summary: Bill C-69—Proposed Amendments" (16 November 2018), online: <www.capp.ca/wp-content/uploads/2019/11/330132.pdf>; Canada, Senate, Standing Committee on Energy, the Environment and Natural Resources, *Evidence*, 42nd Parl, 1st Sess, No 60 (9 April 2019).

22 Canada Energy Regulator, "Market Snapshot: How Does the Early 2020 Crude Oil Price Drop Compare to Other Historic Events in Global Crude Oil Markets?" (25 March 2020), online: <www.cer-rec.gc.ca/en/data-analysis/energy-markets/market-snapshots/2020/market-snapshot-how-does-early-2020-crude-oil-price-drop-compare-other-historic-events-in-global-crude-oil-markets.html>. See also Dinara Millington, "Low Crude Oil Prices and Their Impact on the Canadian Economy," Canadian Energy Research Institute Study No 156 (February 2016), online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/energy-resources/CERI_Study_156_Full_Report.pdf>; Andrew Leach, "Alberta's Oil-Pipeline Pipeline Might Be Nearing its End," *The Globe and Mail* (4 December 2020), online: <www.theglobeandmail.com/opinion/article-albertas-oil-pipeline-pipeline-might-be-nearing-its-end/>.

B. OVERVIEW OF *IAA* STRUCTURE AND FEATURES

In terms of basic architecture, the *IAA* closely resembles its immediate predecessor, *CEAA 2012*.[23] Where *CEAA 2012* represented a total overhaul and fundamental change away from the structure of *CEAA* 1995,[24] the *IAA* is a relatively minor shift by comparison. For example, like *CEAA 2012*, application of the *IAA* is structured around a list of projects set out in regulations[25] and a Ministerial power to designate a project not on the list,[26] rather than the set of statutory triggers that were integral to *CEAA* 1995 (for example, federal funding, federal proponent, federal lands, federal authorization).[27] In practical terms, this means relatively few federal assessments annually, approximately 50–60,[28] compared to the thousands of federal assessments under *CEAA* 1995, most of which were in the form of low-level "screening assessments." That process option was dropped in *CEAA 2012* and the *IAA*.[29] Similar to both of its predecessors and many project-level assessment regimes across the country and around the world, the new federal regime contains assessment processes and requirements that one would expect: an initial screening decision, different process options, delineation of potential effects to be considered, authority to tailor the scope of assessment, the preparation of an environmental impact statement by the proponent, public participation requirements, mechanisms for co-operation with other jurisdictions, a decision-making framework, and follow-up mechanisms.[30]

The new Impact Assessment Agency (Agency), which is a reincarnation of the Canadian Environmental Assessment Agency, presents the new regime as consisting of five phases: planning, impact statement, impact assessment, decision-making, and post-decision.[31] Each phase includes specific legislative requirements that apply to government agencies and project proponents. As discussed in detail in Part III of this article, an important feature to note in relation to energy projects is the screening decision at the end of the planning phase,

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23 Martin Olszynski, "Impact Assessment" in William A Tilleman et al, eds, *Environmental Law and Policy*, 4th ed (Toronto: Emond Montgomery, 2020) at 469–73 [Olszynski, "Impact Assessment"]. See also Meinhard Doelle & A John Sinclair, "The New IAA in Canada: From Revolutionary Thoughts to Reality" (2019) 79 Environmental Impact Assessment Rev; David V Wright, "Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation and 'Consideration' in the *Impact Assessment Act*" (2020) 33:3 J Envtl L & Prac 185 [Wright, "Indigenous Confidence"]; Martin Olszynski, "In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69" (15 February 2018), online (blog): <ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69/>.

24 Doelle, "End of Federal EA," *supra* note 19.

25 *Physical Activities Regulations*, SOR/2019-285. Note that these regulations are based on the *CEAA 2012* regulations which were based on the *CEAA* 1995 Comprehensive Studies List, which includes large-scale projects with the potential for significant adverse effects. See Canadian Environmental Assessment Agency, "Comprehensive Studies" (25 November 2014), online: <iaac-aeic.gc.ca/010/type3index-eng.cfm>; Office of the Auditor General of Canada, *2014 Fall Report of the Commissioner of the Environment and Sustainable Development*, Chapter 4 — Implementation of the Canadian Environmental Assessment Act, 2012 (Ottawa, Office of the Auditor General, 2014) at 4.21, online: <www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_04_e_39851.html> [*CESD Report*].

26 *IAA*, *supra* note 6, s 9.

27 *CEAA* 1995, *supra* note 18, s 5(1). See also Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, LexisNexis, 2008) at 86-87 [Doelle, *Federal EA Process*]. Ministerial discretion to designate a project is also continued under section 9 of the *IAA*, *supra* note 6.

28 Olszynski, "Impact Assessment," *supra* note 23 at 467–68. See also *CESD Report*, *supra* note 25.

29 Olszynski, "Impact Assessment," *ibid* at 467. See also Doelle, "End of Federal EA," *supra* note 19.

30 Paul Muldoon et al, *An Introduction to Environmental Law and Policy*, 2nd ed (Toronto: Edmond Montgomery, 2015) at 232.

31 Impact Assessment Agency of Canada, "Impact Assessment Process Overview" (8 November 2019), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview.html>.

which, based on several factors,[32] may determine that no federal assessment is required at all.[33]

While the *IAA* structure closely resembles *CEAA 2012*,[34] there are a number of significant differences and important new features built into different phases of the process. The most consequential of these pertain to the following: inclusion of a new "planning phase," elimination of the *CEAA 2012* constraints on public participation, broadening of the scope of assessment by including new factors to consider and an expanded definition of effects, expansion of bases for consultation and collaboration with Indigenous communities, and a new final decision-making framework based on whether the project is determined to be in the public interest. These changes, along with several relevant features that have been carried over and modified from the previous regime (for example, basis for co-operation between jurisdictions, legislated timelines), are discussed in detail in Part IV in relation to energy projects specifically.

III. OVERVIEW OF "ENERGY PROJECTS" CONTEXT

A. CANADIAN ENERGY PROJECTS

For the purposes of the present analysis, "Canadian energy projects" refers to energy sector or electrical utility sector physical activities that could fall within the explicit descriptions in the *Physical Activities Regulation* list of projects.[35] By way of specific examples, this would include the following:

- "The construction, operation, decommissioning and abandonment of one of the following: (a) a new coal mine with a coal production capacity of 5 000 t/day or more."[36]

- "The expansion of an existing mine, mill, quarry or sand or gravel pit in one of the following circumstances: (a) in the case of an existing coal mine, if the expansion would result in an increase in the area of mining operations of 50% or more and the total coal production capacity would be 5 000 t/day or more after the expansion."[37]

- "The construction, operation, decommissioning and abandonment of a new oil sands mine with a bitumen production capacity of 10 000 m^3/day or more."[38]

- "The expansion of an existing oil sands mine, if the expansion would result in an increase in the area of mining operations of 50% or more and the total bitumen production capacity would be 10 000 m^3/day or more after the expansion."[39]

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32 *IAA*, *supra* note 6, s 16(2) (including potential adverse effects within federal jurisdiction, adverse impacts on the rights of Indigenous peoples, comments from the public, and any relevant strategic or regional assessments).
33 *IAA*, *ibid*, s 16(1).
34 Olszynski, "Impact Assessment," *supra* note 23; Wright, "Indigenous Confidence," *supra* note 23.
35 *Physical Activities Regulations*, *supra* note 25.
36 *Ibid*, Schedule 2, s 18.
37 *Ibid*, Schedule 2, s 19.
38 *Ibid*, Schedule 2, s 24.
39 *Ibid*, Schedule 2, s 25.

- "The construction, operation, decommissioning and abandonment of a new fossil fuel-fired power generating facility with a production capacity of 200 MW or more."[40]

- "The expansion of an existing fossil fuel-fired power generating facility, if the expansion would result in an increase in production capacity of 50% or more and a total production capacity of 200 MW or more."[41]

- "The construction, operation, decommissioning and abandonment of a new *in situ* oil sands extraction facility that has a bitumen production capacity of 2 000 m^3/day or more and that is (a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province; or (b) within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province and that limit has been reached."[42]

- "The construction, operation, decommissioning and abandonment of a new *pipeline* …that requires a total of 75 km or more of new right of way."[43]

- The construction, operation, decommissioning and abandonment of a new hydroelectric generating facility with a production capacity of 200 MW, and the expansion of such a facility resulting in an increase in capacity of 50 percent or more and a total production capacity of 200 MW or more.[44]

Energy projects would also include other items on the list such as construction, operation, expansion, decommissioning and abandonment of various oil and gas facilities (for example, large new oil refineries, storage facilities, processing facilities above certain thresholds);[45] and construction, operation, decommissioning and abandonment of international or interprovincial power lines.[46] Putting this in ordinary terms, these projects include physical activities pertaining to extraction of energy resources (namely, coal, oil and gas), processing and storage of such energy products, transportation of such energy resources (primarily via pipeline), and generation and transmission of electricity. Obviously, while the *IAA* project list applies across the country, these specific project types are of particular importance in Alberta given the considerable size of its energy sector.

While what constitutes a Canadian energy project in this context may seem broad on its face, relatively few projects are likely to trigger application of the *Act*, as will be discussed in Part IV. There are, however, two proposed energy projects in Alberta that, while relatively early in the assessment process, are helpful for the present analysis: the Suncor Base Mine Extension and the Coalspur Vista Coal Mine Project. There are also two energy projects not in Alberta but still useful for illustrative purposes: the Gazoduq pipeline project in Ontario

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40 *Ibid*, Schedule 2, s 30.
41 *Ibid*, Schedule 2, s 31.
42 *Ibid*, Schedule 2, s 32.
43 *Ibid*, Schedule 2, s 41.
44 *Ibid*, Schedule 2, ss 42, 43.
45 *Ibid*, Schedule 2, ss 37, 38.
46 *Ibid*, Schedule 2, s 39.

and Quebec and the Cedar LNG project in British Columbia. Each of these is briefly described here to set the context, and then specifics are discussed in Part IV. In total, since the coming into force of the *IAA*, just five energy projects have triggered assessment under the *IAA*.[47]

The Suncor Base Mine Extension is a proposed expansion of Suncor's mining operation near Fort McMurray; it includes a 30,000 hectare expansion of the open-pit mining operation and associated infrastructure, and it would produce up to 225,000 barrels of oil per day over an estimated 25-year span commencing in 2030. The Coalspur Vista Coal Mine Project, near Hinton, has open pit and underground mining components (proposed separately by the proponent, as discussed in more detail below) for the extraction and export of thermal coal to international markets. The project would increase production of coal by up to six million tonnes per year with a predicted ten-year project life. The Gazoduq Project is the proposed construction and operation of an approximately 780-kilometre natural gas pipeline between northeastern Ontario and Saguenay, Quebec,[48] with the proponent estimating approximately 50 years of operation that includes transporting up to 51 million cubic metres of natural gas per day en route to overseas markets. Finally, the Cedar LNG Project is a proposal to construct and operate a floating LNG processing facility and marine export terminal near Kitimat, British Columbia,[49] which would process and liquefy natural gas to produce approximately three to four million tonnes of LNG per year, and include storage capacity for up to 250,000 cubic metres of LNG[50] for an estimated lifespan of at least 25 years.

B. PROVINCIAL JURISDICTION OVER ENERGY PROJECTS

Before moving on to examine specific implications of the *IAA*, it is important to briefly describe constitutional and jurisdictional dimensions, as many individuals and groups view some types of large energy projects, particularly resource extraction projects, as "provincial projects" that are somehow under the exclusive jurisdiction of the province.[51] Canadian constitutional law is quite clear on this matter. The environment is not an enumerated area of jurisdiction;[52] rather, it is an area of shared jurisdiction and overlapping authority between the federal and provincial governments.[53] Both levels of government, acting on their respective authorities under the *Constitution Act*,[54] have the constitutional authority to

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47 These include Suncor Base Mine Expansion, Vista Coal, Gazoduq, and Cedar LNG. It should be noted that at the time of writing two other energy projects were in the planning phase: ATCO Salt Cavern, and Tilbury Phase 2 LNG Expansion Project. It should also be noted that assessments of a number of energy projects commenced under *CEAA 2012* are also ongoing, such as the Grassy Mountain Coal Project in southern Alberta and the Roberts Bank Terminal 2 Project in British Columbia.

48 Impact Assessment Agency of Canada, "Gazoduq Project" (1 September 2020), online: <iaac-aeic.gc.ca/050/evaluations/proj/80264>.

49 Stantec Consulting Ltd, "Project Description Summary: Cedar LNG Liquefaction and Export Terminal" (30 August 2019), online: *Canadian Impact Assessment Registry* <iaac-aeic.gc.ca/050/documents/p80208/132668E.pdf>.

50 *Ibid* at 2.

51 *Re Impact Assessment Act* (15 June 2020), Alberta 1901-0276 (ABCA) (Factum of the Attorney General of Alberta) at paras 28–32, 106–109, 121–23. See also *Re Impact Assessment Act* (15 June 2020), Alberta 1901-0276 (ABCA) (Factum of the Attorney General of Saskatchewan) at paras 16–17. See also Government of Alberta, News Release, "Bill C-69: Statement from Premier Kenney" (2 May 2019), online: <www.alberta.ca/release.cfm?xID=63835C45BCF04-E483-0BF5-4EF8FDCDEC5CB854>.

52 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64 [*Oldman River*]. See also Jamie Benidickson, *Environmental Law*, 4th ed (Toronto: Irwin Law, 2013) at 31.

53 *Ibid*. See also *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 120 [*Moses*].

54 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985 Appendix II, No 5, ss 91–92A.

legislate in relation to the environment[55] and have indeed done so for decades.[56] In the context of major natural resources projects, including energy projects situated entirely within a single province, the courts have been clear in explaining that there is no such thing as a "provincial project" and that such characterization is not helpful.[57] Unlike very early division of powers cases, courts today do not view provincial and federal jurisdiction as "watertight compartments."[58] Rather, courts begin with the assumption that both federal and provincial acts are validly enacted, and that such legislation is to be interpreted taking a "co-operative federalism" or "flexible federalism" approach to apply constitutional doctrine and principles to reconcile or minimize any contradiction.[59] As such, there is a sound constitutional basis for federal impact assessment, and this has been upheld by the Supreme Court of Canada multiple times.[60]

At the same time, it is appropriate to acknowledge that the body of case law dealing with federal jurisdiction over impact assessment is relatively small, and as such, there is ample room for further judicial commentary and clarification.[61] The province of Alberta's constitutional reference case,[62] politically animated as it may be,[63] is a helpful initiative in this regard. The opinion from the Alberta Court of Appeal and the inevitably ensuing opinion from the Supreme Court of Canada will add valuable contours to this area of the law. In any event, the balance of this article proceeds on the basis that the *IAA* is constitutionally sound.

IV. IMPLICATIONS OF THE NEW REGIME

As noted at the outset, there are unanswered questions in the present context as to how the *IAA* will affect federal assessment of energy projects, and perhaps more importantly to some, there is the important ultimate question of whether the *IAA* will affect the *outcome* of project assessments — in other words, will the *IAA* actually result in fewer approved energy projects in Canada? These questions guide the analysis below.

A. APPLICATION OF THE *IAA*

As described above, application of the *IAA* is primarily dictated by whether a proposed project falls within the project list set out in Schedule 2 of the *Physical Activities Regulation*.[64] While energy projects figure prominently in this list, and it is foreseeable that

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55 *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 193 [*Quebec v NEB*].

56 Benidickson, *supra* note 52 at 31–42.

57 *Oldman River*, *supra* note 52 at 68. See also Martin Olszynski & Nigel Bankes, "Setting the Record Straight on Federal and Provincial Jurisdiction Over the Environmental Assessment of Resource Projects in the Provinces" (24 May 2019), online (blog): <ablawg.ca/2019/05/24/setting-the-record-straight-on-federal-and-provincial-jurisdiction-over-the-environmental-assessment-of-resource-projects-in-the-provinces/>.

58 *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at paras 37–38.

59 *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136 at paras 107–10, aff'd 2009 BCCA 481. See also *Quebec v NEB*, *supra* note 55 at 193.

60 *Oldman River*, *supra* note 52, *Moses*, *supra* note 53. See also Olszynski & Bankes, *supra* note 57.

61 Doelle, *Federal EA Process*, *supra* note 27 at 67–71 (possible interpretations of *Oldman*).

62 OC 160/2019 (9 September 2019) (*Judicature Act*), online: <www.qp.alberta.ca/documents/Orders/Orders_in_Council/2019/2019_160.pdf>.

63 Sarah Rieger, "Alberta's Legal Challenge of Bill C-69 Is Part of a List of Grievances Against Ottawa," *CBC News* (23 February 2021), online: <www.cbc.ca/news/canada/calgary/kenney-madu-impact-assessment-act-1.5924814>.

64 *Physical Activities Regulations*, *supra* note 25.

in many cases such projects will be situated in oil and gas-rich Alberta, the number of projects that actually trigger application of the federal regime is likely to be *fewer* under the *IAA* than under *CEAA 2012*. This is because the *IAA* list is largely based on the *CEAA 2012* regime,[65] which was put in place under the previous Harper government, except the changes in some cases have now moved thresholds upward — that is, projects need to be even larger or longer to trigger the *Act*.[66] For example, the production capacity threshold for a new coal mine to trigger the *Act* is up from 3,000 t/day[67] to 5,000/t day,[68] and the minimum length of a pipeline to trigger the *Act* is up from 40km[69] to 75km or more of new right away.[70]

At first blush, one notable exception to this shift toward fewer projects triggering the federal regime is with respect to in situ oil sands projects. These projects are now explicitly on the list. However, there is an important qualifier built into this item: an exemption for in situ oil sands projects that are in a province where there is a legislated limit on GHG emissions and that limit has not been reached. In Alberta, such a legislated cap is indeed in place at the present time,[71] so this exemption applies across the board.[72] The *Oil Sands Emissions Limit Act* states the following: "the greenhouse gas emissions limit for all oil sands sites combined is 100 megatonnes in any year,"[73] and this excludes emissions attributable to new upgraders or increased capacity at existing upgraders up to a combined maximum of ten megatonnes as well as emissions attributable to the electric energy portion of cogeneration.[74]

While regulations have yet to be put in place, this Alberta statute quite clearly satisfies the terms of the exemption created in the *IAA* project list, and any other province could enact similar statute. Estimates indicate this limit might be reached around 2030[75], though the trend of per barrel oil sands GHG emissions continues to be downward[76] and the provincial law includes significant carve-outs for certain emissions sources.[77] What is critical to recognize here, though, is that the in situ provisions in the project list only require in very general terms

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65 *Regulations Designating Physical Activities*, SOR/2012-147 [2012 *Regulations*]. See also Regulatory Impact Analysis Statement: Physical Activities Regulations: SOR /2019-285, (2019) C Gaz II 153:17 at "b. Project types with changed descriptions," online: <gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html>.

66 Sharon Mascher, "As Bill C-69 Receives Royal Assent, Will the Project List Deliver on the Promise?" (25 June 2019), online (blog): <ablawg.ca/2019/06/25/as-bill-c-69-receives-royal-assent-will-the-project-list-deliver-on-the-promise/>.

67 2012 *Regulations*, *supra* note 65, Schedule at para 16(d).

68 *Physical Activities Regulations*, *supra* note 25, Schedule 2 at para 18(a).

69 2012 *Regulations*, *supra* note 65, Schedule at para 46.

70 *Physical Activities Regulations*, *supra* note 25, Schedule 2 at para 41. See also Victoria Goodday, "Demystifying Bill C-69: The Project List" (December 2019) *Energy & Environmental Policy Trends*, online: *University of Calgary School of Public Policy* <www.policyschool.ca/wp-content/uploads/2019/12/Energy-Trends-Bill-C-69.pdf>; Mascher, *supra* note 66.

71 *Oil Sands Emissions Limit Act*, SA 2016, c O-7.5 [*Oil Sands Act*].

72 But see Nigel Bankes, "Oil Sands Emission Limit Regulation: A Real Commitment or Kicking It Down the Road?" (3 November 2016), online (blog): <ablawg.ca/2016/11/03/oil-sands-emission-limit-legislation-a-real-commitment-or-kicking-it-down-the-road/> [Bankes, "Real Commitment?"] (for concerns about efficacy and stringency).

73 *Oil Sands Act*, *supra* note 71, s 2(1).

74 *Ibid*, s 2(2).

75 Millington, "Oil Sands Outlook," *supra* note 5 at 25. See also CER, *Canada's Energy Future*, *supra* note 5; Ian Hussey, "Five Things to Know about Alberta's Oil Sands Emissions Cap" (22 February 2017), online (blog): <www.parklandinstitute.ca/five_things_to_know_about_albertas_oil_sands_emissions_cap>; Canadian Institute for Climate Choices, "Canada's Net Zero Future: Finding Our Way in the Global Transition" (February 2021), online: *Canadian Institute for Climate Choices* <climatechoices.ca/wp-content/uploads/2021/02/Canadas-Net-Zero-Future_Summary_FINAL.pdf>.

76 CER, *Canada's Energy Future*, *supra* note 5 at 78.

77 Bankes, "Real Commitment?," *supra* note 72.

that "provincial legislation is in force to limit" the emissions.[78] As such, a provincially legislated cap, such as Alberta's cap at 100 MT, could easily be amended upward by the provincial government, thus expanding this exemption of in situ oil sands project from federal assessment. This should comprehensively satisfy concerns about federal overreach through the *IAA* — including constitutional constraints — as it leaves in situ oil sands projects primarily to the province to assess and regulate. As discussed below, in the rare cases that do trigger a federal assessment, the *IAA* includes mechanisms for federal-provincial co-operation, as seen in the Gazoduq (Quebec) and Cedar LNG (BC) projects. Given this situation, it is highly unlikely that the new federal regime, and the project list in particular, will translate into more federal assessments of energy projects in the near and mid-term, and possibly not the long term either.

Intervener submissions in the Alberta *IAA* reference have put this in pragmatic terms by explaining that even in the energy project-intensive Alberta context the number of projects that trigger application of the *IAA* will be approximately 2.14 projects per year (not including any on federal lands).[79] Similarly, analysis by the University of Calgary School of Public Policy concluded that, "[t]he IAA list is arguably more lenient than CEAA on oil and gas pipeline proponents," and "[b]ased solely on a comparison of projects that will automatically require federal review, it is not likely that the IAA will be a disabler of major infrastructure projects, especially oil and gas pipeline infrastructure, as compared to the outgoing CEAA."[80] However, for those projects that do trigger the federal regime, the process will be different due to a number of changes discussed further below.

While the main mechanism for triggering the *IAA* is the project list, which was the case for the Suncor Base Mine Expansion, the Cedar LNG project, and the Gazoduq project, the Minister also has discretionary power to designate a project,[81] as was the case under *CEAA 2012*.[82] This is the situation with the Vista Coal Mine Project. That project was presented to the federal assessment regime as two separate projects: expansion of the open-pit mine and coal rejects dump area[83] and expansion of the underground mine and associated activities.[84] Both activities are for extraction and export of thermal coal to international markets. In December 2019, the federal Minister initially determined that the Phase II expansion project did not require a federal assessment.[85] However, in July 2020, following the proponent's filing of the adjacent underground mine activities, the federal Minister determined that these two projects together warrant a federal assessment, and pursuant to section 9 of the *IAA*, the

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78 *Physical Activities Regulation*, *supra* note 25, ss 32–33.

79 *Re Impact Assessment Act* (15 June 2020), ABCA, File Number 1901-0276-AC (Factum of the Intervener Nature Canada), online: *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/nc_factum_affidavit_iaa_reference_20-06-15_filed.pdf>.

80 Goodday, *supra* note 70.

81 *IAA*, *supra* note 6, s 9.

82 *CEAA 2012*, *supra* note 8, s 14(2).

83 Impact Assessment Agency of Canada, *Analysis Report: Whether to Designate the Coalspur Mine Ltd. Vista Coal Mine Phase II Project in Alberta* (Ottawa: Impact Assessment Agency of Canada, 2019) at 3, online: *Canadian Impact Assessment Registry* <iaac-aeic.gc.ca/050/documents/p80341/133221E.pdf> [IAAC, *Analysis Report: Vista Coal Mine*].

84 Impact Assessment Agency of Canada, "Phase I Vista Test Underground Mine and Vista Mine II Expansion Projects" (14 June 2021), online: <iaac-aeic.gc.ca/050/evaluations/proj/80731?culture=en-CA>.

85 IAAC, *Analysis Report: Vista Coal Mine*, *supra* note 83.

Minister designated them a project under the act.[86] A key stated reason for doing so was because "[c]onsidered together, the area of mining operations for the Projects would be just below the 50 percent threshold, and at 18,683 tonnes per day, well above the total coal production capacity threshold of 5,000 tonnes per day described in Item 19(a) of the *Physical Activities Regulations*."[87]

This example illustrates two key points with respect to application of the *IAA* to energy projects. First, the Minister has the discretion to designate a project that does clearly not fall within the explicit terms of the project list. Second, based on the Vista Coal Mine Project experience, where two geographically and temporally proximate projects proposed by a single proponent would together meet or almost meet one of the thresholds set out in the project list, the Minister may be more inclined to exercise this discretion. In addition to application of the criteria in the discretionary project designation power in the act,[88] it is not difficult to see the rationale behind this particular decision on the proposed Vista Coal Mine Project. If the Minister were to not require an assessment in this context, it could create an incentive for proponents to break large projects into smaller components that fall just below the legislated thresholds, a practice referred to as "project splitting."[89] This early example in *IAA* implementation signals that project splitting will not be tolerated in the new regime.

B. PLANNING PHASE

The *IAA* introduces a new "planning phase" at the front-end of the assessment process. This phase is 180 days,[90] which is significantly longer than the 45-day screening step under *CEAA 2012*.[91] The planning phase begins by the proponent determining if a project is on the project list (in consultation with the Agency if necessary) and then submitting an initial project description.[92] As such, it is the proponent who decides when the process formally commences.[93] The initial project description is a preliminary overview of the proposed project and its potential effects.[94] At the end of the planning phase, a proponent must provide

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86 Jonathan Wilkinson, Minister of Environment, "Order Designating Physical Activities: Vista Coal Mine Phase II Expansion Project" (30 July 2020), online: <iaac-aeic.gc.ca/050/evaluations/document/135629>.

87 Jonathan Wilkinson, Minister of Environment, "Minister's Response: Vista Coal Mine Phase II Expansion Project" (30 July 2020), online: *Canadian Environmental Assessment Registry* <iaac-aeic.gc.ca/050/evaluations/document/135632> [Wilkinson, "Minister's Response"].

88 *IAA*, *supra* note 6, ss 9(1)–9(2). To summarize, these built-in criteria include if the project may cause adverse effects (including direct or incidental) within federal jurisdiction, if public concerns warrant the designation, and adverse impacts the project may have on the rights of Indigenous peoples in Canada. All of these criteria were in play in the Vista Coal Mine Project context, as explained in the Minister's designation. See Wilkinson, "Minister's Response," *supra* note 87.

89 Meinhard Doelle, "The Implications of the SCC Red Chris Decision for EA in Canada" (2010) 20 J Envtl L & Prac 161 at 167, online: <uwaterloo.ca/applied-sustainability-projects/sites/ca.applied-sustain ability-projects/files/uploads/files/mdoelle_red_chris_case_cmt_jelp.pdf> (discussion of project splitting under previous regime).

90 *IAA*, *supra* note 6, s 18(1).

91 *CEAA 2012*, *supra* note 8, s 10.

92 *IAA*, *supra* note 6, s 10(1).

93 Impact Assessment Agency of Canada, "Impact Assessment Process Overview—Phase 1: Planning" (8 November 2019), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview/phase1.html> [IAAC, "Phase 1 Overview"].

94 *Information and Management of Time Limits Regulations*, SOR/2019-283, Schedule 1 [*Information Regulations*] ("Information Required in Initial Description of Designated Project," *ibid*, s 4).

a detailed project description[95] that informs the Agency's screening decision and the Tailored Impact Statement Guidelines (TISGs).[96]

Throughout the planning phase a proponent undertakes engagement activities with the public and Indigenous communities, while also gathering information to be included in the detailed project description and beyond. The Agency, meanwhile, is required to ensure that the public is provided with opportunities to participate meaningfully, including by inviting comments.[97] In this phase, the Agency must also offer to consult with other jurisdictions, including Indigenous communities who may be affected by the project.[98] The Agency also has to provide to the proponent any information or knowledge provided to the Agency by other federal departments, and a summary of issues that the Agency considers relevant, as well as issues raised by the public, an Indigenous community or others.[99] The proponent is required to respond to this information in addition to providing the detailed project description.[100] In addition to the summary of issues document, it is during the planning phase that the Agency would put in place a co-operation plan with other jurisdictions, an engagement and partnership plan with Indigenous communities, a public participation plan, permitting plans with other federal authorities (for example, fisheries, navigation of public waters), and finally the TISGs.[101]

All of these steps and requirements in the planning phase then inform the ensuing Agency screening decision, which includes consideration of the project's potential adverse effects within federal jurisdiction.[102] In this way, the planning phase is an additional measure for maintaining a sound constitutional basis for the assessment process as it moves beyond preliminary steps. It also serves as a mechanism for the federal government to ensure that it is aware of any potential effects on areas of federal jurisdiction and that it is not abdicating any of its roles and responsibilities, for example with respect to fisheries or navigation. In some cases, the Agency's screening decision at the end of planning phase may conclude that no federal assessment is required at all, which would mark the end of the federal process.

In practical terms for energy projects across Canada, addition of the new planning phase increases the volume and type of activity required of proponents early in the process. For example, the detailed project description and response to the Agency's summary of issues marks a departure from *CEAA 2012*, which required only a single project description before the assessment, and that requirement was completed before the process was open to public comment.[103] However, the new planning phase also increases the time and basis upon which a proponent can work with the public, Indigenous communities, and the Agency to determine whether an assessment is required and to set the basis for an efficient process in cases where one is required. Overall, the 180-day planning phase may add to the permissible total time of the assessment process; however, as discussed in more detail below, jurisdictional clarity and robust early engagement with other jurisdictions, the public and Indigenous communities

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95 *IAA*, *supra* note 6, s 15.
96 *Information Regulations*, *supra* note 94, Schedule 2.
97 *IAA*, *supra* note 6, s 11.
98 *Ibid*, s 12.
99 *Ibid*, s 14(1).
100 *Ibid*, s 15.
101 IAAC, "Phase 1 Overview," *supra* note 93 at FAQ 11.
102 *IAA*, *supra* note 6, s 16.
103 *CEAA 2012*, *supra* note 8, s 8.

may lead to less stopping of the statutory timelines later in the process. As *IAA* implementation unfolds, it will be observable the extent to which this up-front work results in increased public confidence, predictability, and a faster time for final decisions on projects.

C. FEDERAL-PROVINCIAL CO-OPERATION

Similar to its predecessors,[104] the *IAA* contains broad bases for coordination and co-operation with other jurisdictions, and provinces like Alberta in particular. This is reflected in the stated *IAA* purpose "to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each."[105] Specifically, the *IAA* allows for joint federal-provincial reviews, substitution, and delegation. Putting this in plain terms, the *IAA* retains the long-standing practice where, for assessments referred to a review panel, the Minister may enter into an agreement with a province to jointly establish a review panel. This is the case, for example, in the Suncor Base Mine Expansion Project and will likely be the approach for the Vista Coal Mine Project.

Alternatively, the *IAA* allows a province to substitute its own process for the federal one as long as the provincial process satisfies several explicit criteria (for example, consideration of all factors set out in section 22(1) and consultation with potentially affected Indigenous communities)[106] and as long as the assessment has not been referred to a review panel.[107] One notable change from *CEAA 2012* is that where that *Act required* that the Minister approve substitution if the Minister was of the opinion the provincial process was an "appropriate substitute,"[108] this power is now permissive, not mandatory.[109] Short of substitution, the *IAA* also allows the federal government to delegate any part of the process, as well as preparation of the assessment report, to a provincial government.[110] The *IAA*, however, no longer allows for the "equivalency" option that previously permitted the federal government to completely step away from assessing a project if it determined that a province's regime was equivalent to the federal process.[111] In all situations under the *IAA*, be it substitution, delegation, or joint review, the federal government remains the final decision-maker with respect to the federal side of the assessment.

In practice, such co-operation would begin before or during the new planning phase and would formally commence pursuant to the planning phase requirement for the Agency to offer to consult with provinces.[112] In cases where the Agency determines a federal assessment is required and where a provincial government has powers, duties, or functions in relation to the project's environmental effects, the Agency must offer to consult and co-operate with

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104 Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009) 20:1 J Envtl L & Prac 1.

105 *IAA*, *supra* note 6, s 6(1)(e). See also Brenda Heelan Powell, *Environmental Assessment & the Canadian Constitution: Substitution and Equivalency* (Edmonton: Environmental Law Centre, 2014), online: <elc.ab.ca/media/94543/EAConstitutionBriefFinal.pdf>.

106 *IAA*, *ibid*, s 33(1).

107 *Ibid*, s 32(a).

108 *CEAA 2012*, *supra* note 8, s 32.

109 *IAA*, *supra* note 6, ss 31(1), 32–35.

110 *Ibid*, s 29.

111 Heelan Powell, *supra* note 105.

112 *IAA*, *supra* note 6, s 12.

that province.[113] It is through those interactions on a case-by-case basis that the federal and provincial governments will decide and formalize how co-operation will be implemented.

This means the *IAA* changes this tract of legal landscape minimally. Due to their size and tendency to attract public concern, most large energy projects have been and will continue to be referred to review panels. Given the unavailability of substitution for those projects referred to a review panel,[114] which was also the case under *CEAA 2012*,[115] it is likely that most co-operation will take place through joint review panels, just as it has for many years. Put another way, the *IAA* continues to provide a broad statutory basis to satisfy proponents' oft-cited desire for "one project, one assessment," and conversely, further room for the "fading federal presence in impact assessment."[116]

D. ELIMINATION OF PUBLIC PARTICIPATION CONSTRAINTS

Constraints on public participation that were controversially introduced in *CEAA 2012*[117] have been removed from the *IAA*. Where *CEAA 2012* departed from *CEAA* 1995 by requiring that for certain projects public participation be limited to an "interested party,"[118] the *IAA* has dropped this constraint. As such, the *IAA* now more closely resembles CEAA 1995 and provides a broad basis for public participation. This aspect of the federal regime is guided by the concept of "meaningful public participation" which figures prominently as a purpose of the act,[119] and as a key requirement in the planning phase,[120] screening decision,[121] and impact statement and assessment phases.[122] The overarching approach, as stated in new guidance materials, is a government commitment "to providing Canadians with the opportunity to participate meaningfully in the process and to providing them with the information needed to participate in an informed way,"[123] which is supported by several principles set out at the guidance level.[124]

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113 *Ibid*, s 21(b).

114 *Ibid*, s 32(a).

115 *Ibid*, s 33(1)(b).

116 Arlene Kwasniak, "Multi-Jurisdictional Assessment and Bill C-69 — The Further Fading Federal Presence in Environmental Assessment" (26 March 2018), online (blog): <ablawg.ca/2018/03/26/multi-jurisdictional-assessment-and-bill-c-69-the-further-fading-federal-presence-in-environmental-assessment/>.

117 Gibson, "In Full Retreat," *supra* note 19. See also Doelle, "End of Federal EA," *supra* note 19.

118 *CEAA 2012*, *supra* note 8, s 28. See also *CESD Report*, *supra* note 25, ss 4.31–4.43; *Forest Ethics Advocacy Association and Donna Sinclair v The National Energy Board, The Attorney General of Canada and Enbridge Pipelines Inc*, 2014 FCA 245.

119 See *IAA*, *supra* note 6, s 6(1)(h) (purpose "to ensure that opportunities are provided for meaningful public participation during an impact assessment," *ibid*).

120 *Ibid*, s 11.

121 *Ibid*, s 16(2)(d).

122 *Ibid*, ss 22(1)(n), 27, 51(1) (for assessment by review panel). See also Impact Assessment Agency of Canada, "Guidance: Public Participation under the *Impact Assessment Act*" (26 April 2021) at Annex 1, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-public-participation-impact.html> [IAAC, "Guidance: Public Participation"] (full inventory of public participation provisions).

123 Impact Assessment Agency of Canada, "Interm Framework: Public Participation Under the *Impact Assessment Act*" (26 November 2020), s 1.1, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/framework-public-participation.html> [IAAC, "Framework Public Participation"].

124 *Ibid*, s 2.

Despite this renewed openness in the process, it remains open to the Agency to put in place administrative mechanisms to manage, and in some cases limit, participation.[125] This is described in Agency guidance as follows:

> In certain circumstances, where the volume of participation is high and the amount of time available for participation is limited, the Agency or Review Panel may apply various techniques or approaches to best manage participation, while ensuring members of the public have an opportunity to share their views and concerns.
>
> For example, the Agency or Review Panel may take measures to prioritize the allocation of time at an in-person event to those individuals or groups that, in the view of the Agency or Review Panel, are most likely to be impacted by the project, or to those most likely to have relevant expertise or information to provide. The time allocations would not preclude other members of the public from participating in the process through other engagement methods. These circumstances have proven to be rare and are likely to occur only for highly contentious projects. The objective of any such time allocation measures taken would be to ensure that the available time is used to hear the full range of views, and to avoid, where possible, frivolous or vexatious participation.[126]

For many energy projects, the most relevant concern for project proponents is likely to be the extent to which more groups and individuals are permitted to participate in any given assessment. In short, there is likely to be a concern that the removal of constraints present in *CEAA 2012* will translate into a delay. A few points are important to note in this context. First, it is clear from *IAA* guidance that at a practical, administrative level the Agency and review panels will put in place methods that stream participants in a hierarchical way such that high volumes can be managed.[127] This Agency work will be augmented and reflected in the now-mandatory "Public Participation Plan" that must be issued at the end of the planning phase.[128] It is reasonable to expect that such methods, which will be tailored and clarified during the planning phase,[129] will be calibrated to prevent delay in the process. Second, despite more openness, the process is still bound by the statutory time limits.[130] As stated in Agency guidance, "[p]ublic participation will occur within legislated timelines and consultation timelines set by the Agency."[131] To be sure, however, there is tension between the renewed open invitation to public participation and the shortened process timelines (discussed in more detail below); this is an area to watch as *IAA* implementation unfolds. Third, the new federal regime is premised on recognition of the benefits of public participation, such as enhancing legitimacy of the process, inclusion of community knowledge to improve or adapt the project, and improved transparency.[132] Given the

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125 *IAA*, *supra* note 6, s 27 (this provision builds in Agency discretion by virtue of the qualifier "in a manner that the Agency considers appropriate").

126 IAAC, "Framework Public Participation," *supra* note 123 at 3.

127 IAAC, "Guidance: Public Participation," *supra* note 122.

128 See e.g. Impact Assessment Agency of Canada, "Public Participation Plan: Impact Assessment of the Gazoduq Project" (17 July 2020), online (pdf): <iaac-aeic.gc.ca/050/evaluations/document/135778>.

129 IAAC, "Guidance: Public Participation," *supra* note 122 at 4.

130 *IAA*, *supra* note 6, ss 18(1), 18(3), 28(2), 28(6), 31(2), 36(1), 37–37.1, 41–42, 65.

131 IAAC, "Framework Public Participation," *supra* note 123 at 5. Statutory authority is by virtue of section 27, which stipulates that participation opportunities are to be "within the time period specified by the Agency," *ibid*.

132 Meinhard Doelle, "The Proposed New Federal Impact Assessment Act (IAA) Under Bill C-69: Assessment & Reform Proposals" (2018) Schulich School of Law Working Paper, online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=3134139> (commentary on benefits).

Agency's stated approach to implementing the public participation requirements, this aspect is unlikely to substantially change the process for energy project proponents, though it may provide an expanded basis of public support — that is, social licence[133] — for such projects.[134]

E. CONSULTATION AND COLLABORATION WITH INDIGENOUS COMMUNITIES

Crown consultation, engagement, and some degree of collaboration with Indigenous communities have been part of federal project-level assessment for many years.[135] The *IAA* expands the basis upon which these activities may — and in many cases, must — take place. One simple illustration of the degree of change from the previous regime is the increase from the five references to "Aboriginal peoples"[136] in *CEAA 2012* to the 88 instances of the word "Indigenous" in the *IAA*.[137] The substantial expansion is visible in the *IAA*'s explicit requirements that the Agency *must* offer to consult with Indigenous communities during the planning phase, that potential adverse impacts of the project on the rights of Indigenous peoples must be taken into account in the screening decision,[138] and that the assessment phase must take into account Indigenous knowledge,[139] Indigenous cultures,[140] potential adverse impacts of the project on the rights of Indigenous peoples,[141] and any assessment of the project that has been carried out by or on behalf of an Indigenous governing body.[142] The final decision-making framework now also explicitly requires consideration of "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*."[143] A full survey and discussion of this set of changes is beyond the scope of the article;[144] however, several features and associated implications stand out when viewed in relation to energy projects.

First, while the *IAA* changes the specific statute-level requirements of the federal assessment process, it does not — and cannot — change Crown consultation obligations. The *IAA* also has not (and cannot) changed the law with respect to the very high threshold of

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133 Kristen van de Biezenbos, "The Rebirth of Social License" (2019) 14:2 McGill J Sustainable Development L 157 (for a full discussion of social license).

134 Note that despite constraints, *CEAA 2012* still allowed for significant numbers of individuals and groups to participation. See Shaun Fluker & Nitin Kumar Srivastava, "Public Participation in Federal Environmental Assessment under the *Canadian Environmental Assessment Act 2012*: Assessing the Impact of 'Directly Affected'" (2016) 29 J Envtl L & Prac 65.

135 See generally Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013). See also Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53:2 Osgoode Hall LJ 632.

136 *CEAA 2012*, *supra* note 8, ss 4(1)(d), 5(1)(c), 19(3), 105(g).

137 *IAA*, *supra* note 6. Many of these instances are discussed below.

138 *Ibid*, s 16.

139 *Ibid*, s 22(1)(g). See also Lauren E Eckert et al, "Indigenous Knowledge and Federal Environmental Assessments in Canada: Applying Past Lessons to the 2019 Impact Assessment Act" (2020) 5:1 FACETS 67 (discussing Indigenous knowledge in environmental assessment).

140 *IAA*, *ibid*, s 22(1) (l).

141 *Ibid*, s 22(1)(c).

142 *Ibid*, s 22(1)(q). See also Wright, "Indigenous Confidence," *supra* note 23 (for full discussion).

143 *IAA*, *supra* note 6, s 63(d).

144 Wright, "Indigenous Confidence," *supra* note 23 (for full discussion). See also David Laidlaw, "Bill C-69, the *Impact Assessment Act*, and Indigenous Process Considerations" (15 March 2018), online: (blog): <ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-consider ations/>.

justification required for the Crown to infringe on proven Aboriginal rights and title.[145] As such, this aspect of the constitutional landscape remains the same, existing independent of the statutory scheme. In practical terms, federal government decision-making on major energy projects has typically triggered the duty to consult, and will continue to do so in the new context. What is new, however, is that the *IAA* responds to previous uncertainty in the extent to which the federal government would rely on the assessment processes in discharging the duty to consult. While the courts have been clear that the Crown may fulfill its consultation duties through existing schemes, such as project-level assessment processes,[146] how federal and provincial governments exercise this latitude varies. The *IAA* now offers additional, explicit guideposts (summarized above) in each phase of the assessment process.[147]

Second, courts have been clear in holding that Crown consultation activities may be delegated to project proponents, though the legal duty remains with the Crown.[148] Such delegation and associated activities by project proponents are common practice already.[149] New, explicit provisions of the *IAA* provide proponents more clarity on what ought to be done, by whom, and by when. While this may begin before the *IAA* process officially commences, the new planning phase plays an important role in the new regime. Specifically, for each assessment the TISGs and an "Indigenous Engagement and Partnership Plan" must be developed during the planning phase, and both will include information on proponent-led engagement activities.[150] For example, the Gazoduq Project's TISGs set out detailed descriptions of the expected proponent-led engagement activities,[151] and these are detailed further in the specific Indigenous Engagement and Partnership Plan.[152] In short, the new regime, and the expanded planning phase in particular, is likely to enhance clarity around roles, responsibilities, and resourcing in Indigenous consultation and engagement activities by providing an overarching framework that translates into specific details on a project-by-project basis. The planning phase also provides more time and space for proponents to work

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145 In contexts of proven Aboriginal rights and title, the Crown must seek consent of the Indigenous community (not just consultation). Canadian law may, however, still not require consent if the Crown can demonstrate that infringement of the Indigenous rights is justified, and part of the justification test considers consultation with the Indigenous community. It is reasonable to expect that the Crown would point to Indigenous engagement within the *IAA* process as consultation to satisfy the test for justification of infringement. For a detailed discussion of infringement and justification, see *R v Sparrow*, [1990] 1 SCR 1075. See also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44. For a succinct overview, see generally Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 259.

146 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Thames*].

147 Wright, "Indigenous Confidence," *supra* note 23.

148 *Clyde River*, *supra* note 146 at para 22 ("the Crown always holds ultimate responsibility for ensuring consultation is adequate," *ibid*).

149 Lambrecht, *supra* note 135.

150 Impact Assessment Agency of Canada, "Policy Context: Indigenous Participation in Impact Assessment" (27 November 2020) at 3, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html>.

151 Impact Assessment Agency of Canada, "Gazoduq Project: Tailored Impact Statement Guidelines Pursuant to the *Impact Assessment Act* and the *Canadian Energy Regulator Act*" (17 July 2020), s 5, online: <iaac-aeic.gc.ca/050/evaluations/document/135390?&culture=en-CA#_Toc45733726> [IAAC, "Gazoduq TISG"].

152 *Ibid*, s 8.

toward optimizing benefits for Indigenous communities, including through impact and benefit agreements.[153]

Third, while the *IAA*'s new final decision-making framework in the form of a public interest determination may appear on its face to be different from the previous regime, and it is different in several regards explained below, the law is substantially the same with respect to the rights of Indigenous communities. The courts have been clear in stating in pre-*IAA* contexts that, while there is no "duty to agree,"[154] a government cannot find a project could be in the public interest if Crown consultation obligations were not satisfied.[155] The mandatory consideration of section 35 rights in section 63 of the *IAA* essentially codifies this point of law — that is, the Governor in Council must consider whether Crown consultation obligations have been discharged, and, if they have not, then the project cannot be in the public interest.[156] As such, while unsatisfactory to many Indigenous communities who would prefer to see consent as the standard (not just consultation duties),[157] this feature of the *IAA* adds some clarity on the relationship between the federal assessment regime and duty to consult jurisprudence. It is important to acknowledge here that many important criticisms have been stated with respect to the structure of the federal statute on this front.[158]

Finally, at the risk of speculating, and notwithstanding the critiques cited above, it is also important to point out that one impact of the changes brought in by the *IAA* could be a reduction in the frequency of legal challenges brought by Indigenous communities in relation to energy projects. *CEAA 2012* attracted strong criticism from Indigenous communities in part because of its rigid participation rules and associated procedures. To the extent that the *IAA* changes those elements and effects of *CEAA 2012*, the new regime may attract increased confidence, or at least less suspicion, from Indigenous communities potentially affected by the process. Having said this, it is important to acknowledge that the *IAA* also falls short on this front in a number of ways,[159] including with respect to the disconnect between the federal

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153 It should be noted that section 7(4) of the *IAA*, *supra* note 6 allows the proponent to "do an act or thing in connection with the carrying out of the designated project" that may affect the health, social or economic conditions of an Indigenous community so long as the Indigenous community and proponent have agreed that the act or thing may be done. This essentially hives of what would be part of the assessment process, and could create incentive to put benefit agreements in place.

154 *Haida*, *supra* note 146 at para 42; *Tsleil-Waututh Nation v Attorney General of Canada*, 2018 FCA 153 at para 494 [*Tsleil-Waututh*].

155 *Clyde River*, *supra* note 146; *Thames*, *supra* note 146.

156 For detailed commentary on the duty to consult in relation to linear energy projects, see David V Wright, "Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments" (2018) 23:1 Rev Const Stud 175. See also David V Wright, "Cross-Canada Infrastructure Corridor, the Rights of Indigenous Peoples And 'Meaningful Consultation'" (2020) 13:24 School of Public Policy Publications Research Paper, online (pdf): *University of Calgary Digital Repository* <http://dx.doi.org/10.11575/sppp.v13i0.69222>.

157 See e.g. House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42nd Parl, 1st Sess, No 103 (17 April 2018) at 12:25 (Chief Kluane Adamek). See also British Columbia Assembly of First Nations, "British Columbia Assembly of First Nations Submission to House of Commons Standing Committee on Environment and Sustainable Development On Bill C-69" (6 April 2018) at 5–6, online: <www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9819242/br-external/BritishColumbiaAssemblyOfFirstNations-e.pdf>.

158 Wright, "Indigenous Confidence," *supra* note 23. See also Kris Statnyk, "You think it would relevant to report here that the UN committee on the elimination of racial discrimination continues to call on Canada to halt construction of pipelines due to human rights violations against Indigenous peoples" (28 February 2021 at 9:27), online: <twitter.com/Kris_Statnyk/status/1366062359932932097>.

159 Wright, "Indigenous Confidence," *ibid*.

government's unilateral decision-making power under the *Act* and its concurrent commitment to full implementation of *UNDRIP*.[160]

F. REVISED TIME LIMITS

The *IAA* retains explicit statutory timelines for the assessment process, with some modifications. This feature was first introduced in *CEAA 2012*; it was not present in the *CEAA* 1995. The most notable time limits in *CEAA 2012* were the 365-day time limit on an assessment by the Agency[161] and the 24-month time limit on an assessment by a review panel.[162] The *IAA* makes two notable changes. First, time limits in the assessment phase are shortened. For example, an Agency-led assessment is now limited to 300 days,[163] and a review panel-led assessment is now 600 days.[164] The role of these time limits is reflected in the *IAA* purposes "to ensure that an impact assessment is completed in a timely manner"[165] and "to establish a fair, predictable, and efficient process."[166]

Second, the *Act* and the *Information and Management of Time Limits Regulations* clarify the bases available for suspension of the time limits in certain circumstances. The regulations, for example, clarify that the statutory time limits may be suspended upon written request by the proponent to the Minister, to undertake additional studies or collect additional information related to changes in the design, construction or operation plans for a designated project; or for the collection of certain charges and fees if the proponent has not paid these within set time limits.[167] It should be noted that these time limits and bases for stopping the clock are in addition to the 180-day planning phase described above, which can also be extended. In the Gazoduq pipeline project context, there was an extension of the planning phase by 90 days "to permit cooperation in light of the exceptional circumstances arising from the COVID-19 pandemic and its impacts to communities, businesses and stakeholders."[168] Additionally, in the Suncor Base Mine Extension Project context there was a time limit suspension on a request from the proponent "in order that there may be sufficient time to prepare the draft Tailored Impact Statement Guidelines in cooperation with Alberta to support the goal of one project, one assessment."[169]

Overall, these changes are relatively insignificant and likely to have minimal effect on federal assessment of energy projects. Perhaps the most significant development here is that

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160 Carolyn Bennett (Minister of Indigenous and Northern Affairs Canada), "Announcement of Canada's Support for the United Nations Declaration of Indigenous Peoples" (Speech delivered at the 15th Session of the United Nations Permanent Forum on Indigenous Issues, New York, 10 May 2016), online: <www.canada.ca/en/indigenous-northern-affairs/news/2017/05/speaking_notes_forthehonourablecarolynbennettministerofindigenou.html>.

161 *CEAA 2012*, *supra* note 8, s 27(2).

162 *Ibid*, s 54(2).

163 *IAA*, *supra* note 6, s 28(2).

164 *Ibid*, s 37(2). See also Impact Assessment Agency of Canada, "The Impact Assessment Process: Timelines and Outputs" (27 November 2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/the-impact-assessment-process-timelines-and-outputs.html>.

165 *IAA*, *supra* note 6, s 6(1)(i).

166 *Ibid*, s 6(1)(b).

167 *Information Regulations*, *supra* note 94, s 2.

168 Impact Assessment Agency of Canada, "Gazoduq Project: Notice of Time Limit Extension with Reasons" (14 April 2020), online: <iaac-aeic.gc.ca/050/evaluations/document/134561>.

169 Impact Assessment Agency of Canada, "Suncor Base Mine Extension Project: Notice of Time Limit Suspension with Reasons" (18 September 2020), online: <iaac-aeic.gc.ca/050/evaluations/document/136032>.

the *IAA* did not revert to the *CEAA 1995* approach of having no time limits; the *Act* instead keeps explicit timelines rather than eliminating them altogether.[170] It is still too early to tell whether implementation of the *IAA*'s time limit suspension powers in the *Act* will result in longer total assessment processes, though early examples suggest that these powers will indeed be used. In cases of extended or prolonged processes, it may remain the case that most of the delay is on the part of proponents as it was in the previous regimes,[171] though it is possible that the expanded planning phase provides time and space that allows proponents, the Agency, stakeholders, and Indigenous communities to address or pre-empt issues that may have required stoppage under the previous regime.

G. SCOPE OF ASSESSMENT

One of the most substantial changes in the *IAA* is a broader scope of the assessment. The definition of effects to be considered is expanded beyond environmental impacts to include positive and negative social, health and economic impacts,[172] and all impact assessments under the *IAA* must "take into account" the significantly expanded list of factors set out in section 22(1).[173] Many of these factors are the same as those in *CEAA 2012* such as cumulative effects, mitigation measures, and comments from the public. However, several are new or significantly modified. The present discussion focuses on a common feature across key assessment factors: large degrees of flexibility for project proponents, coupled with a lack of bright lines or "no-go" rules. The *IAA* climate change provisions are perhaps the clearest example of this and are as such discussed in some detail here, before then touching on other provisions of potential concern to energy project proponents, including those related to sustainability, gender, economic benefits, and project alternatives.

1. CLIMATE CHANGE

The *IAA* requires that the assessment phase takes into account "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."[174] While this explicit climate change provision is new in the federal regime, the work now required of proponents is only partially new. For many years now, greenhouse gas emissions (GHG) information has been part of most federal environmental assessment processes.[175] Typically, this work was guided by a specific assessment's terms of reference and involved only basic quantification and tallying of a project's expected emissions on annual and total

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

171 Grant Bishop & Grant Sprague, "A Crisis of Our Own Making: Prospects for Major Natural Resource Projects in Canada" (February 2019), CD Howe Institute Commentary No 534 at 28, online: <www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary%20534%20Compressed.pdf>.

172 *IAA*, *supra* note 6, s 2.

173 *Ibid*, s 22(1).

174 *Ibid*, s 22(1)(i).

175 See Flavia Vieira de Castro, "Canada's Climate Change Mitigation Commitments and the Role of the Federal *Impact Assessment Act*" (2020) 33:3 J Envtl L & Prac 211. See also Toby Kruger, "The *Canadian Environmental Assessment Act* and Global Climate Change: Rethinking Significance" (2009) 47:1 Alta L Rev 161.

bases.[176] However, that practice was inconsistent and uneven, in part because of a lack of clarity at the statute regulation and guidance level.[177] On this front, the *IAA* can be seen as an attempt to bring order and consistency to this realm.[178] A key change is that the *Act* builds in a reference point against which GHG information will be viewed: the link between a project's expected emissions and Canada's climate change commitments. These commitments include Canada's commitments under the Paris Agreement, as well as the goal for Canada to achieve net-zero emissions by 2050.[179]

While the *IAA* provision is relatively succinct, as are the relevant provisions in the *Information and Management of Time Limits Regulations*,[180] details of what it means in practice are set out in federal guidance released the form of the final "Strategic Assessment of Climate Change" (SACC)[181] and further technical guidance is forthcoming.[182] The SACC provides details on what information must be submitted during each phase of the assessment process.[183] For example, it sets out how a proponent is to quantify a project's GHG emissions, including with respect to "net emissions"[184] as well as upstream emissions.[185] It also clarifies that estimates of downstream emissions are not required.[186] The SACC also stipulates other detailed informational requirements, for example that proponents should provide information with respect to the emissions intensity of the project for each year[187] and that "proponents of projects with a lifetime beyond 2050 [must submit] a credible plan to achieve net-zero emissions by 2050."[188]

Several features are of particular significance for energy projects: unlimited access to offsets, ability to point to corporate level actions beyond the scope of the project itself, and an invitation to describe how the project may result in global emissions reductions. As to the first, outside of several stipulations in the SACC about the source of credits (for example, must be from a project registered in a Canadian regulatory offset program, cannot be more than five years old, and must be verified to a reasonable level of assurance),[189] there are no limits on the total volume of credits relied on by a proponent.[190] This unlimited access to credits provides immense flexibility in how proponents may design and present any project, including oil and gas, as a low-emission project. In practical terms, this flexibility means a proponent could use credits to offset all of a project's GHG emissions, thus achieving net-zero emissions for the project's entire life-cycle. This latitude is expanded further by the

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176 See Mark Friedman, "Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (in)Action?" (2016) 6:3 Western J Leg Studies 5. See also de Castro, *ibid*.

177 *Ibid*.

178 See David V Wright, "Climate Change Considerations in the Federal *Impact Assessment Act*: Step Forward or Business as Usual?" (2020) 8:4 Energy Regulation Q, online: <www.energyregulationquarterly.ca/articles/climate-change-considerations-in-the-federal-impact-assessment-act-step-forward-or-business-as-usual#sthash.yj6Gm5Or.dpbs> [Wright, "Step Forward?"].

179 Environment and Climate Change Canada, *Strategic Assessment of Climate Change*, Catalogue No EN14-417/2021E-PDF (Gatineau, Environment and Climate Change Canada, 2021) at 3, 18, online (pdf): <www.strategicassessment climatechange.ca/16736/widgets/65686/documents/40846> [SACC].

180 *Information Regulations*, *supra* note 94.

181 SACC, *supra* note 179.

182 *Ibid* at 4.

183 Wright, "Step Forward?," *supra* note 178.

184 SACC, *supra* note 179 at 5 (calculation at 3.1.1 defining "net emissions").

185 *Ibid* at 8–9.

186 *Ibid* at 5.

187 *Ibid*.

188 *Ibid* at 1.

189 *Ibid* at 7.

190 Wright, "Step Forward?," *supra* note 178.

SACC inviting proponents to rely on non-project, "corporate level" action taken elsewhere in Canada, such as afforestation,[191] as part of net emissions calculations[192] and as part of a credible net-zero emissions plan.[193] This allows the project-specific assessment to take into account actions and operations far removed from the actual project. Finally, the guidance invites proponents to "describe how the project is likely to result in global emission reductions," and acknowledges "a project that enables the displacement of high-emitting energy abroad with lower-emitting energy produced in Canada could be considered as having a positive impact."[194] While this could be seen as selective incorporation of downstream emissions analysis,[195] it is no doubt a welcome development for proponents of LNG projects who take the (controversial) view that exported Canadian LNG will actually result in global emission reductions.[196]

For energy projects in particular, several implications of the SACC stand out. First, in relative terms compared to previous federal regimes, it provides clarity on the requirements and expectations of the federal assessment process. Where there was once silence at the statute level and only outdated, non-binding guidance,[197] there are now explicit statutory provisions accompanied by regulations and detailed guidance. Second, the SACC reveals that there is no bright-line "climate test," nor any clearly demarcated quantitative emissions limit above which a project will not be approved. Rather, there are multiple bases upon which a project proponent can present an emissions-intensive undertaking as a low-emissions project for the purposes of the assessment. And, looking at the assessment regime more broadly, GHG information remains just one factor to be considered in the assessment and decision-making phases. As such it is quite possible that emission intensive projects are permitted to proceed on the basis that it is in the public interest for other various reasons, including potential economic benefits. This is a common theme across the IAA's expanded scope of assessment: the breadth is offset by significant flexibility for proponents and broad discretion for final decision-making by government.

2. SUSTAINABILITY

Such flexibility is also present in the *IAA*'s new sustainability provisions. Sustainability is defined 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."[198] One of the stated purposes of the Act is to "foster sustainability,"

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191 SACC, *supra* note 179 at 5.

192 *Ibid*.

193 *Ibid*.

194 *Ibid* at 13.

195 Wright, "Step Forward?," *supra* note 178. See also David V Wright, "Final Strategic Assessment of Climate Change: Zero Net Effect?" (10 August 2020), online (blog): <ablawg.ca/2020/08/10/final-strategic-assessment-on-climate-change-zero-net-effect/>.

196 Jason Dion, "No Canada Cannot Get Credit for its Low-Carbon Exports"(17 June 2019), online (blog): <ecofiscal.ca/2019/06/17/no-canada-cannot-get-credit-low-carbon-exports/>. See also "No, Canada Can't Save the Planet by Exporting More Natural Gas," *The Globe and Mail* (12 December 2019), online: <www.theglobeandmail.com/opinion/editorials/article-no-canada-cant-save-the-planet-by-exporting-more-natural-gas/>.

197 Canada, Federal-Provincial-Territorial Committee on Climate Change and Environmental Assessment, *Incorporating Climate Change Considerations in Environmental Assessment: General Guidance for Practitioners*, Catalogue No EN106-50/2003E-PDF (Ottawa, Canadian Environmental Assessment Agency, 2003), online (pdf): <publications.gc.ca/pub?id=9.686753&sl=0>.

198 *IAA*, *supra* note 6, s 2.

and this is supported by new assessment and decision-making factors that require taking into account "the extent to which extent to which the designated project contributes to sustainability."[199] These provisions came as a disappointment to some,[200] and fall short of the Expert Panel's recommendation to include a "test for approval" that would require a project to "create an overall net benefit to Canada for present and future generations."[201]

Instead, the *IAA* provisions and associated guidance, provide energy project proponents with a broad, if ambiguous, basis to assert that a project will indeed "foster" and "contribute to" sustainability. For example, the guidance and methodology published by the Agency require only that proponents present potential effects of their project in relation to four very broad sustainability principles (human-ecological systems, present and future well-being, positive and adverse effects, and precaution and uncertainties).[202] This is then carried through in project-specific contexts via the TISGs, as seen in the Gazoduq example, which states: "The Impact Statement must describe how sustainability principles were applied (outlined above) and identify conclusions drawn from this analysis. This summary should be qualitative in nature, but may draw on quantitative data as necessary."[203] While this is clearly new, additional analysis that proponents must undertake in the new federal regime, it is also clearly not a particularly rigid dimension of the assessment and does not introduce a determinative "net-benefit" test for approving rejecting or energy projects.[204]

3. INTERSECTION OF SEX AND GENDER WITH OTHER IDENTITY FACTORS

Despite concerns expressed during the *IAA* law reform process,[205] the new statutory requirement to take into account "the intersection of sex and gender with other identity factors"[206] provides another example of wide flexibility for proponents without rigid parameters to constrain decision-making. It also builds on existing government commitments

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199 *Ibid*, ss 22(1)(h), 63(a).

200 Robert B Gibson, "Assessment Law Is Still Too Vague to Achieve Lasting Green Goals," *Policy Options* (11 October 2019), online: <policyoptions.irpp.org/magazines/october-2019/assessment-law-is-still-too-vague-to-achieve-lasting-green-goals/> [Gibson, "Assessment Law"]; Doelle & Sinclair, *supra* note 23.

201 Canada, Expert Panel for the Review of Environmental Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, Catalogue No EN106-158/2017E-PDF (Ottawa: Environment and Climate Change Canada, 2017) at 63, online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.

202 Impact Assessment Agency of Canada, "Guidance: Considering the Extent to Which a Project Contributes to Sustainability" (27 November 2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-considering.html>; Impact Assessment Agency of Canada, "Framework: Implementation of the Sustainability Guidance" (27 November 2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance.html>.

203 IAAC, "Gazoduq TISG," *supra* note 151 at 124. See also Impact Assessment Agency of Canada "Suncor Base Mine Extension Project: Draft Tailored Impact Statement Guidelines Pursuant to the *Impact Assessment Act*" (26 February 2021) at 99–100, online: <iaac-aeic.gc.ca/050/documents/p80521/138104E.pdf>.

204 Gibson, "Assessment Law," *supra* note 200.

205 Graeme Hamilton, "Lawyers Stumped over New Gender and Identity Provisions for Environmental Impact Assessments," *National Post* (3 April 2018), online: <nationalpost.com/news/politics/lawyers-stumped-over-new-gender-and-identity-provisions-for-environmental-impact-assessments>. See also Canada, Senate, Standing Committee on Energy, the Environment and Natural Resources, *Evidence*, 42nd Parl, 1st Sess (9 April 2019) (Theresa Redburn).

206 *IAA*, *supra* note 6, s 22(1)(s).

and practices,[207] including in impact assessments.[208] In short, this requirement is to be fulfilled by proponents applying a Gender-based Analysis Plus (GBA+) as part of the assessment of impacts. As explained in Agency guidance, GBA+ "is an analytical framework that guides the assessment of how designated projects may have different positive and negative impacts on diverse groups of people or communities."[209] In practical terms, this will again mean more analysis required from proponents in each phase of the assessment process,[210] including "a more detailed and specific description of positive and adverse effects and enhancement and mitigation options."[211] An example of a plan of how this will look in practice can be seen in the Cedar LNG detailed project description's response to the Agency's summary of issues, which anticipates integration of GBA+ with other parts aspects of the assessment (for example, mitigation measures).[212] However, this section 22 factor is not a determinative factor in terms of project rejection or approval; rather, it will be a dimension embedded in other aspects of the public interest decision.[213] Again, in many cases this will be an invitation for project proponents to demonstrate how potentially negative impacts are outweighed by social and economic benefits, and how the project has been modified to be more responsive to address this assessment factor.

4. "ALTERNATIVES TO" THE PROJECT

The *IAA* reintroduces the requirement to take into account "alternatives to" the project, as opposed to just the "alternative means" requirement in *CEAA 2012*. This revives a similar requirement in *CEAA* 1995.[214] *IAA* section 22(1)(f) requires that the assessment phase take into account "any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project."[215] As described in *IAA* guidance "'Alternatives to' the project are functionally different ways to meet the need for the project and achieve its purpose that are technically and economically feasible,"[216] but proponents

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207 See e.g. Treasury Board of Canada Secretariat, "Gender-Based Analysis" (25 October 2016), online: <www.canada.ca/en/treasury-board-secretariat/services/treasury-board-submissions/gender-based-analysis-plus.html>; Women and Gender Equality Canada, "Action Plan on Gender-Based Analysis (2016-2020)" (2015), online: <www.canada.ca/en/treasury-board-secretariat/services/treasury-board-submissions/gender-based-analysis-plus.html>; Jennifer Koshan, "Bills C-68 and C-69 and the Consideration of Sex, Gender and Other Identity Factors" (2 May 2018), online (blog): <ablawg.ca/2018/05/02/bills-c-68-and-c-69-and-the-consideration-of-sex-gender-and-other-identity-factors/>.

208 Heidi Walker, Maureen G Reed & Bethany Thiessen, *Gender and Diversity Analysis in Impact Assessment* (Ottawa: Canadian Environmental Assessment Agency, 2019) at 3–4, online: <research-groups.usask.ca/reed/documents/CEAA%20Report.FINAL.%20Walker%20Reed%20Thiessen.%20Gender%20Diversity%20in%20IA.Feb%208%202019.pdf>. See also Impact Assessment Agency of Canada, "Gender-Based Analysis Plus in Impact Assessment Fact Sheet" (19 December 2019), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/gender-based-analysis-plus-impact-assessment-fact-sheet.html> [IAAC, "GBA+ Fact Sheet"].

209 Impact Assessment Agency of Canada, "Guidance: Gender-Based Analysis Plus in Impact Assessment" (17 March 2021) at Annex 1, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/gender-based-analysis.html> [IAAC, "Guidance: GBA+"]. See also IAAC, "GBA+ Fact Sheet," *ibid*.

210 See e.g. Stantec Consulting Ltd, "Detailed Project Description: Cedar LNG Liquefaction and Export Terminal" (6 December 2019), online: <iaac-aeic.gc.ca/050/documents/p80208/133319E.pdf> [Stantec, "Cedar LNG Detailed PD"].

211 IAAC, "Guidance: GBA+," *supra* note 209, s 4.0.

212 Stantec, "Cedar LNG Detailed PD," *supra* note 210.

213 *Ibid*. See also Koshan, *supra* note 207.

214 *CEAA* 1995, *supra* note 18.

215 *IAA*, *supra* note 6, s 22(1)(f).

216 Impact Assessment Agency of Canada, "Policy Context: 'Need for', 'Purpose of', 'Alternatives to' and 'Alternative means'" (27 November 2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/need-for-purpose-of-alternatives-to-and-alternative-means.html> [IAAC, "Policy Context: Need and Alternatives"].

"would not be expected to consider every plausible alternative"[217] and under no circumstances would the federal decision-maker require a proponent to implement an "alternative to" that was not identified as the preferred option.[218] In practice, a proponent's approach to the alternatives requirement will follow an outlining of the "need for" and "purpose of" the project (that is, the fundamental rationale and objectives for the project),[219] and what is required of a proponent "will vary depending on the project type."[220] The guidance acknowledges that in some cases there may be limited alternatives and private sector proponents may be less able to consider a broad range of "alternatives to." Specifically in cases of energy projects, the guidance notes that

> [f]or example, in the case of a nuclear energy project, an assessment of energy mandates established through federal and provincial legislation/policy may not be within the scope of the impact assessment (IA) — the alternatives to the project need not include alternatives that are contrary to, or not consistent, with federally mandated initiatives and/or a province's formal plans or directives.[221]

The guidance also explains that this aspect of the assessment "provides an opportunity for a proponent to highlight the benefits of its proposed project as compared to not proceeding with the project, or as compared to other alternatives to a project."[222] As such, similar to the flexibility described above in relation to other assessment factors, this revived aspect of the federal process will require additional analysis from proponents, but the "alternatives to" requirement provides a broad basis for demonstrating project benefits. Once again, this assessment factor is not determinative; rather, it will be one dimension in the broader public interest determination.[223]

5. CHANGES TO ECONOMIC CONDITIONS

The *IAA* also includes an explicit new requirement to assess a project's positive and negative economic effects.[224] An impact assessment must now take into account "the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused" by the project.[225] This will include "direct, indirect or induced economic effects" such as jobs, taxes and royalties, spending by firms involved in the project, increases in income, and associated spending by employees.[226] Analysis of such effects, often referred to as "economic impact assessment," is not new, and the Agency guidance acknowledges several existing methodologies such as

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217 *Ibid*, s 6.
218 *Ibid*, s 9.
219 *IAA*, *supra* note 6, s 22(1)(d). See also IAAC, "Policy Context: Need and Alternatives," *supra* note 216.
220 IAAC, "Policy Context: Need and Alternatives," *ibid*.
221 Impact Assessment Agency of Canada, "Guidance: 'Need for', 'Purpose of', 'Alternatives to' and 'Alternative means'" (23 January 2020), s 3, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-need-for-purpose-of-alternatives-to-and-alternative-means.html>.
222 IAAC, "Policy Context: Need and Alternatives," *supra* note 216, s 4.
223 *Ibid*, s 9.
224 *IAA*, *supra* note 6, s 22(1)(a).
225 *Ibid*.
226 Impact Assessment Agency of Canada, "Analyzing Health, Social and Economic Effects under the *Impact Assessment Act*" (27 November 2020) at 5.3.1, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/analyzing-health-social-economic-effects-impact-assessment-act.html> [IAAC, "Analyzing Health"].

input-output analysis and cost-benefit analysis.[227] It is up to the proponent to choose a method.[228] In some cases, a proponent may be required to provide details on the business case for the project.[229]

Similar to the assessment factors discussed above, for proponents of energy projects this modified requirement represents additional analysis that must be conducted but also enhanced clarity. Information on economic burdens and benefits was typically a part of federal assessments under previous regimes,[230] but now there is more clarity with respect to this element and a very broad basis for proponents to present project benefits in particular. Once again, this assessment factor is not determinative. For decision-making purposes, this aspect of the assessment is subsumed in the public interest determination and, according to the Agency, may be relevant in relation to most of the section 63 public interest considerations.[231] That phase of the assessment process is discussed in the next section below.

V. DECISION-MAKING IN THE PUBLIC INTEREST (WITH REASONS … TO BE JUDICIALLY SCRUTINIZED)

A. PUBLIC INTEREST DETERMINATION

Final decision-making remains in the political realm under the *IAA*.[232] This is one of the starkest illustrations that the *Act* is a retrofit of *CEAA 2012* and not a rebuild. However, where under *CEAA 2012* and *CEAA* 1995 the ultimate decision on a project turned on whether the project was "likely to cause significant adverse environmental effects"[233] and, if so, whether those effects are justified in the circumstances,[234] in the new regime the final decision is based on whether the project is in the "public interest."[235] This public interest determination must be based on the IA report, which the Minister or Governor in Council, as the case may be, uses when considering the five factors explicitly set out in the *Act*.[236] To summarize, these factors include: the project's contribution to sustainability, significance of adverse effects within federal jurisdiction, mitigation measures, impact on the rights of Indigenous peoples, 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 commitments in respect of climate change.[237]

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227 *Ibid* at 5.3.2.
228 *Ibid*.
229 *Ibid* at 5.3.3.
230 See e.g Canada, National Energy Board, *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 1, Catalogue No NE23-176/2013E-PDF (Calgary: NEB, 2013) at 31, 67 online: <publications.gc.ca/collections/collection_2014/one-neb/NE23-176-2013-1-eng.pdf>.
231 IAAC, "Analyzing Health," *supra* note 226, s 6.
232 Doelle & Sinclair, *supra* note 23. See also Olszynski, "Impact Assessment," *supra* note 23.
233 *CEAA 2012*, *supra* note 8, s 52(1).
234 *Ibid*, s 52(2).
235 IAA, *supra* note 6, ss 60–63.
236 *Ibid*, s 63. See Impact Assessment Agency of Canada, "Policy Context: Public Interest Determination under the *Impact Assessment Act*" (27 November 2020), online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/public-interest-determination-under-impact-assessment-act.html> [IAAC, "Public Interest Determination"].
237 *IAA*, *supra* note 6, s 63. It should be noted that while the analysis in this article focuses on the *IAA*, the new *Canadian Energy Regulator Act* (SC 2019, c 28, s 10) would also be engaged for interprovincial and international pipelines and powerline projects, and key assessment phase and decision-making phase provisions in that statute are substantially similar to the *IAA*, including with respect to climate change,

As acknowledged above in relation to specific assessment factors, none of these public interest factors are determinative and there are no embedded thresholds or decision points.[238] Rather, as described in Agency guidance, "the factors will be considered together, along with the Impact Assessment Report, to inform the public interest determination."[239] Feeding into this is the analysis of the section 22 factors which "will inform the decision-maker's consideration of the public interest factors"[240] As noted above, however, one aspect of this final determination is a relatively bright line: the Minister or Cabinet must first ensure that the Crown's duty to consult and accommodate has been met.[241] Beyond this, the *IAA* provides virtually unfettered latitude for decision-makers to draw on the evidentiary record generated through the assessment process, balance various considerations, and then conclude that the project is in the public interest or not.

Notwithstanding the continued unpredictability that comes with leaving the final decision as a political one, the explicit *IAA* decision-making parameters offer more detail than the opaque "justification" language in *CEAA 2012*. As well, the *IAA* adds new requirements that the final decision be accompanied by "detailed reasons" that demonstrate consideration of all of the public interest factors listed in section 63.[242] This sets the stage for better transparency and accountability compared to the *CEAA 2012* regime, and with time this should generate a body of detailed reasons that make decisions under the *IAA* relatively predictable. In these ways, the *IAA* final decision-making framework could be seen as an improvement over *CEAA 2012*.[243]

For energy projects proponents, this decision-making framework may appear daunting. It may, on its face, appear to guide decisions away from approving hydrocarbon projects that might be viewed as inconsistent with sustainability goals, climate change action, Indigenous rights, and environmental protection. However, as the above discussion of assessment factors indicates, a close reading of the *Act* and emerging guidance indicates that all of the considerations feeding into the final decision-making parameters offer broad bases for proponents to substantiate how a project in fact contributes significant benefits in the public interest and will not result in disproportionate negative impacts. Within the *IAA*'s broad final decision-making space, therefore, it is foreseeable that the federal Minister or Cabinet, as the case may be, will be persuaded to conclude that such projects are indeed in the public interest.

B. *IAA* IMPLEMENTATION AND JUDICIAL REVIEW

There will, of course, be litigation that challenges project approvals under the *IAA* or to the processes that lead to them (for example, screening decisions, public participation, and

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concerns of Indigenous peoples, intersection of sex and gender with other identity factors, and environmental effects. Unlike under *CEAA 2012*, assessments of these types of projects regulated by the Canada Energy Regulator would be assessed by an IAA review panel, not the Canada Energy Regulator (formerly the National Energy Board). In practice, the report and recommendations required under the *Canadian Energy Regulator Act* would be included in the review panel's report, as per *IAA*, s 51(3) .

238 IAAC, "Public Interest Determination," *supra* note 236.

239 *Ibid*.

240 *Ibid* at "Public Interest Factors."

241 *Ibid* at "Common Law Obligations."

242 *IAA*, *supra* note 6, s 65.

243 Hunsberger, Froese & Hoberg, *supra* note 170 (evaluating this and other features of the *IAA*).

Indigenous consultation). As such, before moving on to concluding points, it is important to briefly discuss judicial review in relation to *IAA* implementation and what one might expect on this front as *IAA* implementation unfolds. In short, decades of federal assessment experience indicate that courts are overwhelmingly deferential to the work of a reviewing administrative body (namely, Agency or review panel) and final decision-makers (namely, Minister or Cabinet).[244] The standard of review is typically reasonableness.[245] In the new *IAA* context, this is likely to continue; however, application of reasonableness will be different for at least three reasons.

First, there is lingering unevenness on a key point with respect to federal impact assessment — whether the assessment report, issued at the end of the assessment phase but before final-decision-making, may be challenged. The Federal Court of Appeal in both *Gitxaala Nation v. Her Majesty the Queen* (legal challenges to the Northern Gateway Pipeline Project) and *Tsleil-Waututh Nation* (legal challenges to the TransMountain Pipeline Project) held that environmental assessment reports are not directly reviewable and that the final decision by Cabinet was the only decision that could be reviewed.[246] However, this was a departure from the preceding line of cases that had treated assessment reports as directly reviewable.[247] In the inevitable legal challenges that will accompany *IAA* implementation, this uncertainty will likely be reconsidered and clarified by the courts. If courts do return to holding assessment reports as reviewable, then the expanded *IAA* assessment factors would indeed offer bases for legal challenges, notwithstanding the wide flexibility for proponents discussed above. To be clear, even if the courts carry on holding that reports are not reviewable, final decisions (namely, project approval) may still be challenged on the basis that such decisions relied on a deficient report.

Second, *IAA* implementation will be taking place in the context of a recent reformulation of administrative law principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[248] More specifically, the application of *Vavilov* in *IAA* implementation will result in a reasonableness review that is more searching, involving closer scrutiny of administrative decision-making and associated justification.[249] Such enhanced judicial scrutiny is already playing out in environmental and natural resources law contexts.[250] In practical terms, application of *Vavilov* in the *IAA* context means that project proponents, review bodies, and decision-makers will need to exercise heightened diligence and attention to detail if they

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244 Doelle, *Federal EA Process*, *supra* note 27 at 150. See also Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 3rd ed (Toronto: Thomson Reuters, 2019) at 520.

245 *Ibid*. See also Olszynski, "Impact Assessment," *supra* note 23 at 494. See also Martin Z Olszynski & David V Wright, "Case Comment: Tsleil-Waututb Nation v. Canada" (2019) 22:4 Can Environmental L Reports (Articles) 8. See e.g. *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 [*Ontario Power*].

246 *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187 at para 128; *Tsleil-Waututh*, *supra* note 154.

247 See e.g. *Alberta Wilderness Association v Minister of Fisheries and Oceans*, [1999] 1 FC 483 (CA). See also Olszynski & Wright, *supra* note 245. See also Olszynski, "Impact Assessment," *supra* note 23 (questioning whether the holdings in *Tsleil Waututh* and *Gitxaala* were restricted to the specialized regime for NEB-regulated projects under *CEAA 2012*).

248 2019 SCC 65.

249 Shaun Fluker, "*Vavilov* and the Judicial Review of Natural Resources, Energy and Environmental Decisions in Canada" (2020) Canadian Institute of Resources Law No 123, online: <cirl.ca/sites/default/files/Resources/Resources123.pdf>. See also Nigel Bankes, "The Discipline of *Vavilov*? Judicial Review in the Absence of Reasons" (12 May 2020), online (blog): <ablawg.ca/2020/05/12/the-discipline-of-vavilov-judicial-reason-in-the-absence-of-reasons/>.

250 *Ibid*. See also *Attorney General of Canada v Dr David Kattenburg and Psagot Winery Ltd*, 2021 FCA 86 (for a decision outside the natural resources context that applies *Vavilov*).

wish to insulate project approvals from being overturned. As part of this, decision-makers will need to robustly justify their decisions and ensure that they address all the issues brought forward by those involved in the process.

Third, and related to the impact of *Vavilov,* certain new features introduced with the *IAA* will require more effort and substantiation by the Agency and Minister, or a review panel and Cabinet, as the case may be. Where relative silence in previous federal assessment regimes led the courts to apply the reasonableness standard to only require "some consideration" of each assessment factor with the view that a court is "not to act as an 'academy of science,'"[251] the new *IAA* has explicit built-in features to require better. Most notably, as discussed above, section 65 requires "detailed reasons" which will certainly attract judicial scrutiny going forward and will do so in a post-*Vavilov* context that brings greater demands for justification. The *IAA* also includes a new purpose provision specifically directed at requiring better practices on the part of the federal government, namely that powers exercised in the administration of the *IAA* are exercised "in a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy."[252] While the legal effect of these legislated principles is difficult to predict, commentators have suggested that it could lead the courts to require better analysis in federal assessments, particularly with respect to scientific analysis.[253]

Taken together, the *IAA* decision-making framework provides wide latitude and much discretion for the final decision-maker to determine that future energy projects are in the public interest; however, other features in the Act and the application of *Vavilov* mean that the *IAA* implementation is set to attract enhanced judicial scrutiny of final decisions and the assessment process that underpins it. That said, this is in a context where the administrative law principles and precedent continue to support overarching deference by the courts.

VI. CONCLUSION

The foregoing analysis reveals several preliminary conclusions on what the new federal *IAA* means for Canadian energy projects. At the front end of the process, the amended project list is likely to result in fewer federal assessments of energy projects. Despite apparent expansion of the list to include in situ oil sands projects, the generous deference to provincial emissions caps in that project list description will insulate such projects from federal review for the foreseeable future. In the small number of cases where the federal assessment regime is indeed triggered, the *IAA* provides a broad basis for federal-provincial co-operation that can implement a "one project, one review" approach to achieve efficiencies and predictability that project proponents typically seek. Additionally, the renewed openness to

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251 *Ontario Power*, *supra* note 245 at para 125. See also Martin Olszynski & Meinhard Doelle, "Ontario Power Generation Inc v Greenpeace Canada: Form over Substance Leads to a 'Low Threshold' for Federal Environmental Assessment" (22 September 2015), online: *Environmental Law News* <blogs.dal.ca/elaw/2015/09/22/ontario-power-generation-inc-v-greenpeace-canada-form-over-substance-leads-to-a-low-threshold-for-federal-environmental-assessment/>.

252 *IAA*, *supra* note 6, s 6(3) (the Government of Canada, the Minister, the Agency and federal authorities must, in the administration of this Act, exercise their powers in a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy).

253 See Martin Olszynski & Justina Ray, "Science and Indigenous Knowledge as the Evidentiary Basis for Impact Assessment" in Meinhard Doelle & A John Sinclair, eds, *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act* (Toronto: Irwin Law, 2021) 466. See also Fluker, *supra* note 249.

more public participation apparent in some provisions of the *Act* is, in practice, likely to be constrained by shortened statutory time limits and associated procedures. Meanwhile, the expanded planning phase may front-load issues in a way that leads to easier compliance with time limits once the assessment phase begins.

For those projects that trigger the federal regime, the process will be more onerous on account of the expanded scope of assessment that includes several new factors to consider. However, emerging guidance indicates that these new requirements, such as those pertaining to climate change, sustainability, alternatives, and economic impacts, will be implemented in a way that provides project proponents with significant flexibility to present projects in a way that emphasizes project benefits while minimizing negative impacts. Looking to the end of the assessment process, the new public interest determination framework, which contains no bright-line rules nor determinative thresholds or tests, provides decision-makers with a vast amount of discretion and pathways to approve energy projects well into the future. As such, so long as the Crown has satisfied its duty to consult and accommodate, there are very few constraints on the Minister or Cabinet concluding that a project is in the public interest. This discretion for decision-makers, and the related flexibility for proponents, is, however, tempered by the *IAA* requirement to provide detailed reasons and the post-*Vavilov* context where judicial supervision will employ deeper scrutiny of decision-making rationale as part of a reasonableness review.

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