



**FEBRUARY 19, 2021**

## **MEDIA ADVISORY**

### **Environmental lawyers and experts available for interviews on Alberta's constitutional challenge to federal environmental law**

***The issue: Is it unconstitutional for Parliament to enact a law requiring federal assessments of the effects of major proposals such as coal mines and fossil fuel projects?***

Lawyers and experts for interveners represented at next week's Alberta Court of Appeal hearings on the constitutionality of the federal *Impact Assessment Act* are available to comment on the legal issues and policy context of Alberta's challenge to the law.

**WHEN: Friday, February May 19, 2021 from 10:00am to 5:00pm Mountain Time**

#### **Lawyers and experts available include:**

- Stephen Hazell, Emeritus Counsel, Nature Canada, [shazell@naturecanada.ca](mailto:shazell@naturecanada.ca) 613-724-1908
- Jamie Kneen, Communications and Outreach Coordinator, MiningWatch Canada  
[jamie@miningwatch.ca](mailto:jamie@miningwatch.ca) 613-761-2273
- Anna Johnston, Staff Lawyer, West Coast Environmental Law, [ajohnston@wcel.org](mailto:ajohnston@wcel.org)  
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## **ABOUT NATURE CANADA**

Nature Canada is one of the oldest national nature conservation charities in Canada. For 80 years, Nature Canada has helped protect over 110 million acres of parks and wildlife areas in Canada and countless species. Today, Nature Canada represents a network of over 100,000 members and supporters and more than 800 nature organizations. Learn more at [naturecanada.ca](http://naturecanada.ca).

## **ABOUT WEST COAST ENVIRONMENTAL LAW**

West Coast Environmental Law is a non-profit group of environmental lawyers, strategists, and communicators dedicated to safeguarding the environment through law. Together, we are working to transform environmental decision-making and strengthen legal protection for the environment through collaborative legal strategies that bridge Indigenous and Canadian law. Learn more at [wcel.org](http://wcel.org).

## **ABOUT MININGWATCH CANADA**

MiningWatch Canada is a non-profit organization created to provide a public interest response to the threats to public health, the environment, and community interests posed by irresponsible mineral policies and practices in Canada and around the world. It provides timely information and support to mining-affected communities and related organizations, and works for better mining-related policies. Learn more at [miningwatch.ca](http://miningwatch.ca).

# BACKGROUND

## The Constitutionality of the *Impact Assessment Act*

### THE GOVERNMENT OF ALBERTA'S REFERENCE CHALLENGE TO THE CONSTITUTIONALITY OF THE FEDERAL *IMPACT ASSESSMENT ACT*

On September 9, 2019, the Government of Alberta filed an order in council referring the matter of the constitutionality of the federal *Impact Assessment Act* and related laws to the Alberta Court of Appeal. The applications of Nature Canada, Environmental Defence, MiningWatch Canada, Canadian Environmental Law Association, (CELA) and Ecojustice to be admitted as interveners in this Reference were granted by the Alberta Court of Appeal. Nature Canada is represented by West Coast Environmental Law; Environmental Defence, MiningWatch Canada and CELA are represented by CELA lawyers; and Ecojustice is representing itself.

The Alberta Court of Appeal's virtual, live-streamed hearings are scheduled to begin on Monday, February 22 and conclude on Friday, February 26, with appearances by the above interveners scheduled for Thursday, February 25.

### ALBERTA SEEKS FREE HAND TO DEVELOP COAL AND OIL SANDS REGARDLESS OF IMPACTS ON CLIMATE AND BIODIVERSITY

Alberta has gone to court seeking a decision that would prevent the federal government from assessing the impacts of major new projects, including fossil fuel projects such as coal mines, in areas of federal jurisdiction.

The world knows that burning of coal must stop if climate catastrophe and destruction of nature is to be averted. In 2017, Canada signed up with other countries to phase out coal-fired electricity generation by 2030. Despite this international commitment, numerous new mines are proposed—with more to come—for the mountains and foothills of western Canada to produce coal to burn for power generation and steel-making in Asia.

A Court of Appeal decision to declare the *Impact Assessment Act* unconstitutional—if upheld by the Supreme Court of Canada—would give Alberta a free hand to approve coal mines and oil sands projects without federal impact assessment. But it would also leave the federal government without the ability to assess the impacts of industrial development projects and make informed decisions across the country.

### *IMPACT ASSESSMENT ACT* IS CONSTITUTIONALLY VALID FEDERAL LEGISLATION

In this Reference, Alberta essentially claims that Parliament is constitutionally barred from enacting legislation aimed at gathering information and making decisions about the effects of major development projects upon areas of federal interest.

As interveners, Nature Canada and MiningWatch Canada reject Alberta's claim, and say that the *Impact Assessment Act* ("IAA") and the Physical Activities Regulations ("the Regulations") are constitutionally valid legislation. In its *Oldman* decision thirty years ago, the Supreme Court of Canada rejected the arguments that Alberta is raising once again in this Reference and emphasized that the environment is an area of shared jurisdiction. Nature Canada and MiningWatch Canada are intervening in this reference to help ensure that the Alberta Court of Appeal upholds the federal government's authority to make informed decisions and make sure that when it comes to protection of the environment, we have all hands on deck.

Considering *Oldman* and the careful drafting of the IAA, Nature Canada and MiningWatch Canada conclude that the pith and substance of the federal regime is an evidence-based, participatory, and precautionary assessment process that anticipates and prevents adverse effects of certain major projects in areas of federal jurisdiction such as fisheries, migratory birds, and the rights of Indigenous peoples.

### **ALBERTA'S CLAIMS ARE CONSTITUTIONALLY AND FACTUALLY INCORRECT**

**No marked intrusion in areas of core provincial jurisdiction** - Alberta says that the *Impact Assessment Act* "results in a marked intrusion in areas of core provincial jurisdiction, including natural resources, resulting in an effective federal veto power over projects and activities that have been reviewed and approved under comprehensive provincial assessment processes." Not so. The IAA and Regulations are constitutionally valid; only those projects with great potential for significant adverse effects on areas of federal jurisdiction are designated under the Regulations. Moreover, the IAA's cooperation mechanisms foster cooperative federalism and minimize any incidental effects on provincial jurisdiction.

**No federal veto power** - Contrary to Alberta's claim, the IAA confers no federal veto power over non-renewable development *projects* such as oil and gas or mining development. Rather, the IAA focuses federal decision-making on project *effects* that fall within federal jurisdiction.

**No Trojan Horse** - "The Trojan horse has now arrived" says Alberta, with the federal law purporting to apply to a "broad range of activities, many of which are squarely within provincial jurisdiction". There is no Trojan horse. The IAA is a limited precautionary tool for safeguarding components of the environment within federal jurisdiction and ensuring that federal, direct and incidental effects are in the public interest. The federal government has clear constitutional authority to avoid, mitigate or justify adverse effects on matters within federal jurisdiction according to the *Oldman* decision.

**Fewer Alberta projects are subject to mandatory federal assessment** - The IAA affects fewer Alberta projects than the Harper government's 2012 law or the Mulroney government's 1992 law. Ten projects have been triggered for assessment under the IAA since it came into force nearly 18 months ago, including two designations exercised pursuant to the Minister's section 9 discretionary power. This compares to 75 projects per year under the *Canadian Environmental Assessment Act 2012* (CEAA 2012), and as many as 3,314 EAs per year under the *Canadian Environmental Assessment Act* (CEAA 1992). Three of the ten projects triggered under the IAA

are in Alberta: the Coalspur Vista Underground and Coal Mine Expansion; the Suncor Base Oil Sands Mine Extension; and the ATCO Salt Cavern.

Overall, the Project List represents a shorter list of major projects over which the federal government has a strong interest and jurisdiction than under the *CEAA 2012* regulations. The Project List includes fewer oil and gas pipeline projects and fewer coal mines.