November 16, 2022

Project Permitting in Canada and the Mining Industry

Executive summary
The transition to a low carbon economy, as well as changing technology and geopolitical stresses, requires the expeditious development of new mining, energy generation and infrastructure projects in Canada. There is a broad consensus that the timeline for the planning and approval process for new projects, (including "no go") has to be shortened from 10-15 years without losing the requirements for good planning, environmental protection and Indigenous consultation. The federal government is exploring how the project permitting process can be improved. At the same time, the federal government is requesting an opinion from the Supreme Court of Canada on the constitutionality of the *Impact Assessment Act* (IAA) after the Alberta Court of Appeal in May 2022 determined the IAA and the associated *Physical Activities Regulations* are unconstitutional.

Federal environmental/impact assessment has been applied to mining projects since the enactment of the *Canadian Environmental Assessment Act, 1992* (CEAA 1992). In this document, we are sharing our experience with federal assessment legislation. We note why we believe timely, predictable and robust project permitting is essential for Canada to meet the goals it is pursuing, and the role of the mining industry in advancing those goals. We review the challenges the mining industry has experienced with each version of federal assessment legislation and why clarity and stability of legislation is important.

For nearly 30 years, the objective of "one project one assessment" remains elusive. The combination of provincial and federal assessment and approval processes, and related necessary Indigenous engagement, continues to fall short of coordinated, timely and efficient planning. Such uncoordinated process duplication is not seen in other countries.

We highlight our difficulty with understanding how the approach to setting conditions and considering cumulative effects under the *Canadian Environmental Assessment Act, 2012*, (CEAA 2012) was consistent with assessing adverse effects in areas of federal jurisdiction. The same approach has been carried over to the IAA, so clarification being sought remains relevant today.

We hope that the issues and challenges described in this document will provide helpful context for the constitutional debate that will occur before the Supreme Court of Canada.

1. Purpose: sharing our experience

Among all industries, mining has the broadest experience with project permitting. For three decades, the industry has navigated the complex and overlapping provincial and federal processes for assessing and permitting new mines and expansions, as well as for operating approved projects in compliance with complex and overlapping provincial and federal regulatory regimes. The Mining Association of Canada[i] (MAC) is sharing this experience in the hope of contributing to the discussion of how to improve project permitting.

2. Timely project permitting is essential to meeting Canada's goals
There is growing recognition that delays and inefficiencies in project permitting hamper progress on Canada's high priority goals for addressing climate change, energy transition, and secure and resilient supply chains, as well as for operationalizing the Critical Minerals Strategy, implementing UNDRIP and reconciliation with Indigenous peoples, and supporting biodiversity.

Whether, and how soon, a project can be built is determined by the aggregate of all assessment and permitting requirements. How to improve timeliness and efficiency while maintaining a robust process that respects Indigenous rights and Canada's jurisdictional complexity is a challenging question.

3. Importance of stability
Consideration of improvements to project permitting must recognize that investment requires stability and predictability.

The last decade has seen substantive amendments to several federal and provincial acts and regulations. Legislative change, however well intentioned, takes time to implement and can create the perception of instability, uncertainty, and delays.

4. Importance of clarity of legislation rather than reliance on judicial reviews
MAC does not routinely challenge the constitutionality of legislation. We require clarity and defensibility in the legislation enacted.

A mining project is a cost to a company until the mine is in production and begins to generate revenue. The longer it takes to reach production, the higher the cumulative cost to the company, and the lower the present value of more distant revenues. Seeking judicial review of process decisions, such as whether scoping in Tailored Impact Statement Guidelines or conditions extend beyond federal jurisdiction, adds uncertainty, cost and further delay. It will generally be cheaper and quicker for a mining proponent to comply with unwarranted requests than to challenge a request by way of judicial review. In some cases, cancelling a project and investing outside Canada may be preferable to undergoing a lengthy and uncertain judicial review process.

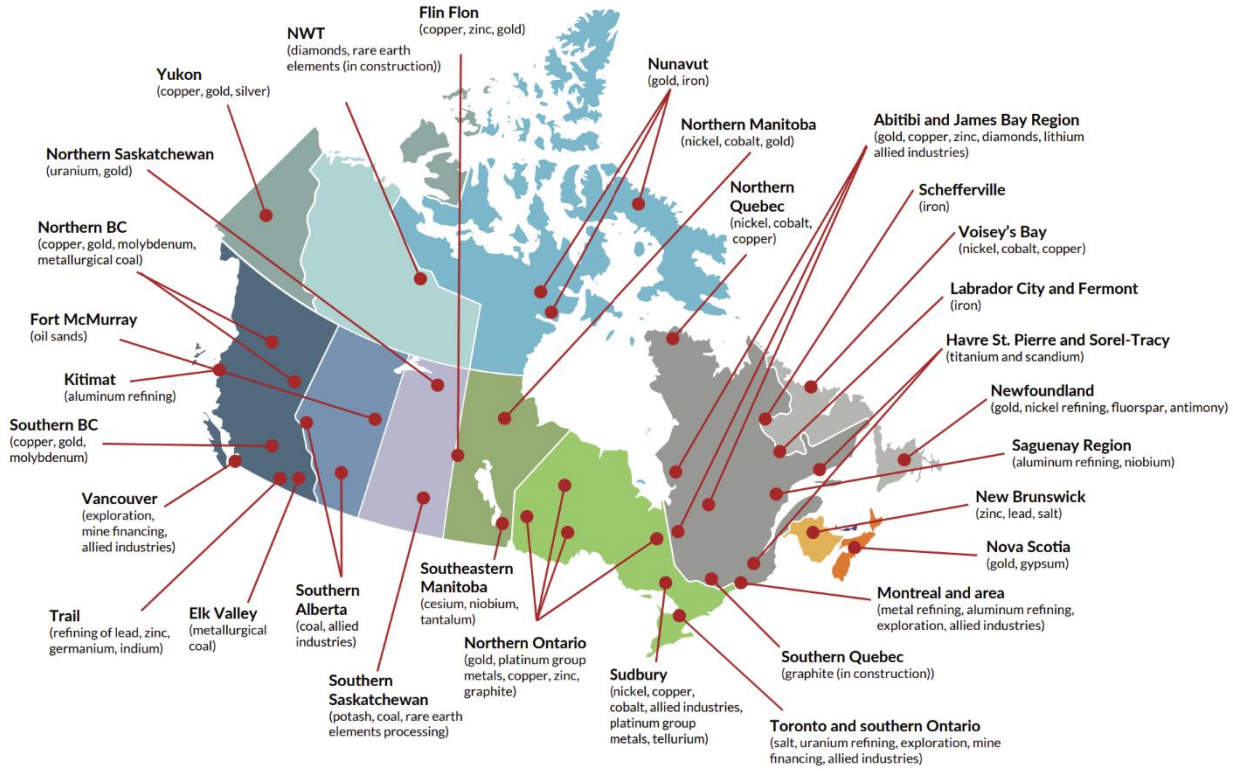
Moreover, a private sector proponent must also consider the risk to its reputation with local communities and regulators. Good relations with neighbours are essential for a mine throughout its life. Regulators have considerable discretion. In challenging a regulator's decision, a company's reputation may be negatively impacted.

It must be recognized that being subject to the IAA is not trivial and is a significant financial, time and resource investment from a company. We disagree that designation of a project under the IAA constitutes a "temporary hold" and that a project can proceed as long as it can avoid causing effects within federal jurisdiction.

Once designated, a project cannot proceed until a decision is made that an assessment is not required or until a decision is made that the project is in the public interest. Regulators will not provide permits and investors will be reluctant to invest until approvals have been obtained. Even if the Planning phase

of the IAA process concludes that an IAA assessment is not required, the "temporary hold" remains in place until such a conclusion is reached. This phase requires the proponent to provide Initial and Detailed Project Descriptions and a response to the Summary of Issues, the latter displaying a substantial array of information requirements (as evidenced by projects having so far experienced the Planning phase of IAA). If an assessment is required, the subsequent phases of the process take years and tremendous effort to complete, and the project cannot proceed to further permitting until the public interest decision is made.

5. The importance of mining to Canada's economy



Canada's mining industry has been a bedrock of the country's economy for decades with the minerals sector having contributed $125 billion, or roughly 5%, to Canada's total nominal GDP in 2021. Some examples of the essential role the industry plays are the direct and indirect wages and employment of approximately 665,000 people across the country (of which over 400,000 are direct jobs), taxes and royalties collected by governments, and the capital expenditures required for project development and operation. Beyond its direct economic impact, the industry also supports many firms and sectors that supply miners with the goods and services they need to operate. Proportionally, the mining industry is the largest private sector employer of Indigenous peoples, providing over 16,500 jobs in communities across the country.

The Toronto Stock Exchange (TSX) and TSX Venture Exchange are the world's number one mining and exploration listing venues where 34%, or $10 billion, of the world's total equity capital was raised in

2021. Mining's value to Canada doesn't stop at Canada's borders, however. Canada's mining sector has investments in over 100 countries worldwide and travelling with and working for the sector are the thousands of Canadian mining supply and services companies. Internationally, Canada is one of the leading mining countries and one of the largest producers of minerals and metals. Valued at $127 billion in 2021, mineral exports accounted for 22% of Canada's total domestic exports, selling a diversified array of minerals and metals abroad.

As noted in the June 2022 *Canada's critical minerals strategy: Discussion paper*, "Critical minerals are the building blocks for the green and digital economy." As described in the February 10, 2022 article in *Policy Options*, Canada has the potential to play a much more significant role in providing the materials the world needs to get to net-zero and to support international supply-chain security. Time is of the essence to ensure that the "building blocks" are put into place.

6. Mining and Indigenous reconciliation and economic development aspirations

The mining sector is committed to building and maintaining respectful and mutually beneficial relationships with Indigenous communities. This commitment is backed by a strong track record of early and meaningful engagement, long-standing relationships and partnerships to ensure that Indigenous peoples have an opportunity to participate in and benefit from nearby mining activity.

MAC member commitments are further demonstrated through participation in *Towards Sustainable Mining* initiative (TSM), a performance-based program whereby mining operations evaluate, manage and publicly report on critical environmental and social responsibilities, including Indigenous and community relationships. TSM is overseen by a Community of Interest (COI) Advisory Panel, which includes participation of individuals from Indigenous organizations and governments. A core component of the program is the *Indigenous and Community Relationships Protocol,* which is designed to facilitate strong relationships through effective engagement and decision-making processes. It establishes good practice that includes striving to achieve free, prior and informed consent (FPIC) before proceeding with development where impacts to rights may occur; ensuring that engagement systems are informed by local protocols, customs, Indigenous laws and governance systems and/or are co-developed with affected Indigenous communities; and collaborating with affected Indigenous communities on mitigating potential adverse impacts and on optimizing community benefits from mining development. More information on TSM can be found at https://mining.ca/towards-sustainable-mining/.

Over the past few decades, opportunities for Indigenous communities to participate in and benefit from mining development have grown significantly. Mining companies in Canada are the largest private sector employer of Indigenous peoples on a proportional basis, with investments in skills training and education helping to facilitate upward mobility of Indigenous employees across a wide spectrum of mining occupations. Beyond direct employment, procurement also plays a significant role in bolstering economic development in Indigenous communities. Other types of benefits include direct payments to communities in accordance with negotiated agreements, equity partnerships, investments in long-term infrastructure and social investments in housing, education, health and recreation. Success can be attributed to the over 520 relationship agreements between mining companies and Indigenous

communities that prioritize Indigenous employment, procurement and collaboration on environmental stewardship and are contributing to economic reconciliation.

7. The permitting landscape for mining projects in Canada

Mining projects are subject to comprehensive provincial regulatory frameworks that are unique to each province and are also subject to several federal requirements. Inadequate coordination and inconsistent approaches between the different levels of government are an ongoing issue leading to uncertainty and increased costs for the mining industry.

Provinces regulate the mining industry long before a new mine is proposed. Provinces own subsurface rights on provincial Crown land. They establish where and how mineral claims can be staked, how exploration for mineral deposits is to be conducted, when Indigenous engagement is mandatory, and which Indigenous groups must be engaged by the exploration/mining company. If a viable mineral deposit is found, obtaining approval to develop it requires undergoing a provincial assessment and mine permitting process. Each province has some form of legislation specific to mining which regulates aspects of mine construction, operation, closure, and reclamation. At all stages, exploration and mining companies must also comply with relevant general provincial requirements such as those regulating vegetation removal, wildlife, fisheries and species at risk protection, water use and discharge, noise or air pollution as well as occupational health and safety rules.

In addition to provincial assessment and permitting, most new mining projects and major expansions are also subject to the IAA. Depending on the type and scope of project, compliance with the *Fisheries Act* and the *Canadian Navigable Waters Act* may be applicable. All mines must also comply with relevant general federal legislation such as the *Explosives Act,* the *Species at Risk Act,* the *Migratory Birds Convention Act* and the *Canadian Environmental Protection Act, 1999*.

Uranium mines are subject to the same provincial and federal requirements as other mines and are also regulated by the Canadian Nuclear Safety Commission, adding yet another source of regulatory overlap.

8. The mining sector's experience with the *Canadian Environmental Assessment Act, 1992* (CEAA 1992), the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), and the IAA

Since the coming into force of CEAA 1992 and its successor legislation, most mining projects in Canada have been subject to federal assessment.

<u>CEAA 1992</u>

Environmental assessment under CEAA 1992 was triggered when a project required a federal decision that was included on Law List regulations. Once triggered, a project underwent a screening or comprehensive assessment, depending on whether it was of a type listed on the Comprehensive Studies List, and could subsequently be referred to a review by a Panel. As *Fisheries Act* authorizations were included on the Law List, any mining project that had the potential to impact fish habitat triggered CEAA 1992, and mines were further included on the Comprehensive Studies List. The result was that mining assessments were a small fraction of the thousands of CEAA 1992 assessments but constituted nearly a quarter[ii] of all comprehensive studies.

CEAA 1992 did not include timelines, making the process unpredictable, but also flexible, allowing the federal process to be aligned with each provincial process. Over time, the Agency negotiated cooperation agreements with each province.

However, initiating a CEAA 1992 assessment process was challenging. The self-assessment approach was a source of tremendous delays and frustrations. Regulators delayed confirming that a decision, such as a *Fisheries Act* s35 authorization[iii], was necessary. Further delays ensued before agreement on a lead Responsible Authority was reached, since most mining projects require more than one decision from more than one federal department. Such delays could reach 18 months, adding to the overall permitting timeline and misalignment with the provincial assessment process. There were cases of a federal assessment beginning when the provincial assessment reached its final stage.

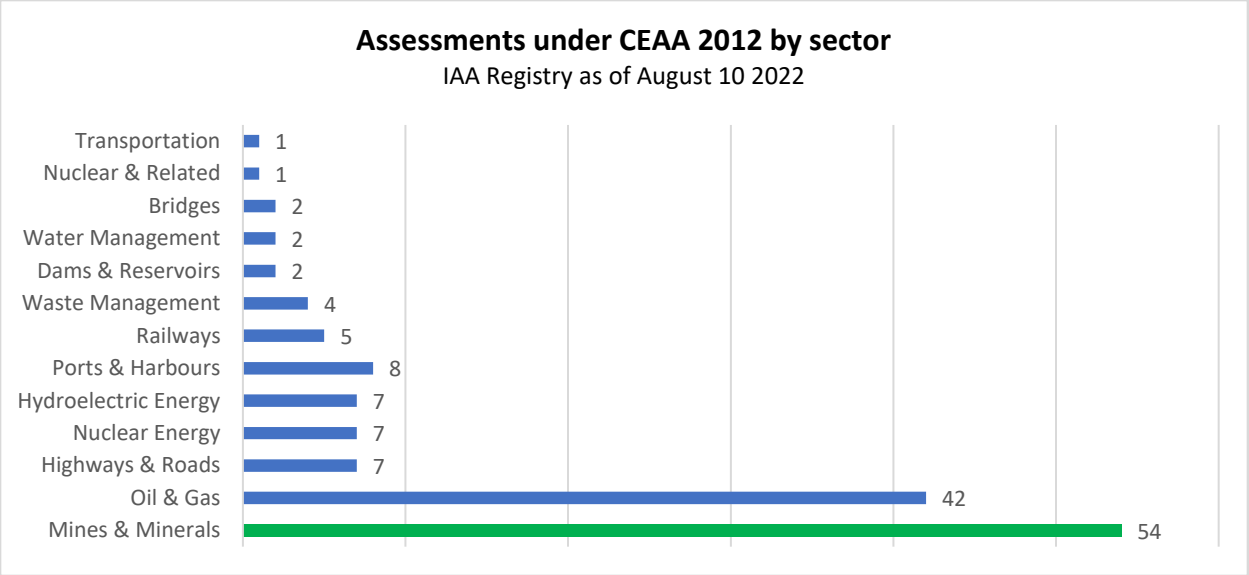
2010 amendment

In 2010, CEAA was amended making the Agency responsible for comprehensive studies and enabling the Agency to initiate an assessment if a project was likely to require a federal decision without waiting for confirmation that a federal decision was required. For mining projects, which were nearly all comprehensive studies rather than screening assessments, this amendment dramatically reduced delays in initiating a CEAA assessment and in the assessment process itself. The timely initiation allowed for simultaneous beginning and good alignment between the federal and provincial assessment processes.

CEAA 2012

CEAA 2012 moved away from using a federal decision trigger, and instead limited its application to projects of a type designated by regulation. Nearly all new mines and major expansions were "designated projects" under CEAA 2012. The *Regulations Designating Physical Activities* included almost all types of mining and set thresholds for metal, diamond and coal mines that captured all economical-scale projects. The triggering system under CEAA 1992 had a similar effect in practice, since in most parts of Canada mining projects require at least one federal decision. While there may have been a few mining projects that would have triggered CEAA 1992 but not CEAA 2012 or vice versa, for the sector as a whole, CEAA 2012 did not change the requirement for most new mines and major expansions to be subject to CEAA, nor the breadth, depth and rigour of the assessment.

The dramatic reduction in the number of projects that were subject to CEAA 2012 compared to CEAA 1992 meant that mining projects became the primary sector subject to federal assessment.



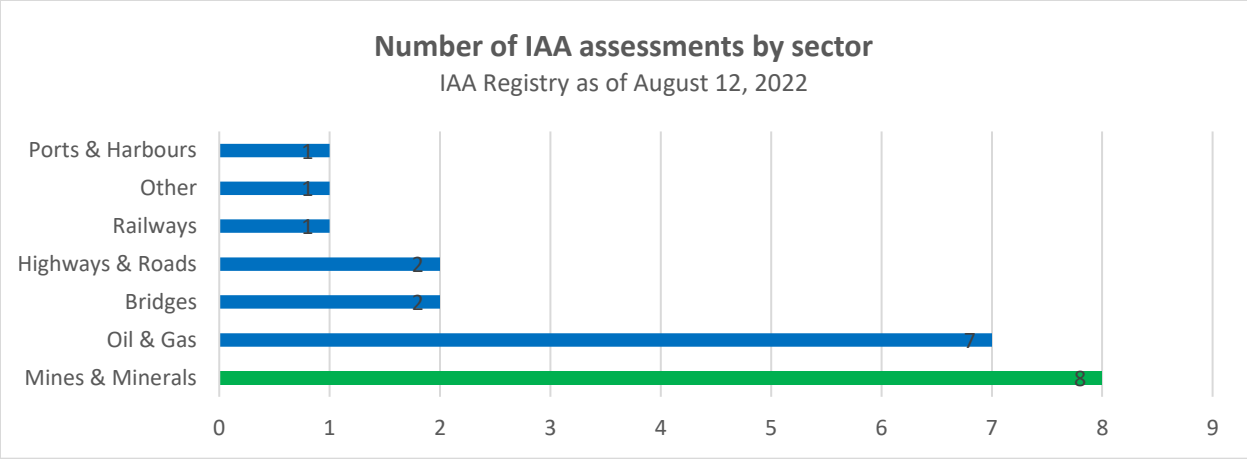
CEAA 2012 improved clarity of the federal assessment process and mandated timelines, encouraging attention to timeliness. However, it is difficult to find evidence that the overall time for CEAA assessments has changed between CEAA 2010 and CEAA 2012. Timeliness was undermined by repeated requests for additional information and the absence of a timeline for referral to Cabinet if an assessment concluded that a project would cause significant adverse effects. Coordination between federal and provincial assessments became difficult in practice since the federal process timeline could not be aligned with each province's timeline.

The absence of a planning phase at the beginning of CEAA 2012 assessments resulted in the use of generic Environmental Impact Statement Guidelines not tailored to the unique issues of each project. As well, the uncoupling of federal assessment from other federal approvals resulted in tandem processes and Indigenous consultations, causing confusion and duplication. In some cases, the post-assessment federal approval process took longer than the assessment.

<u>IAA</u>

Most new mining projects and major expansions remain subject to federal assessment and continue to constitute a major portion of projects subject to the IAA.

As of mid-August 2022, there were 22 assessments under the IAA, of which 10, including 2 mining projects, completed the Planning phase. All are now in the Impact Statement phase (5 Agency assessments, 2 by substitution, and 3 by Review Panel). No project has completed the Impact Statement phase and proceeded to the Impact Assessment and Decision-making phases.



The early experience with the Planning phase of the IAA has fallen short of our expectations. It has not resulted in tailoring of Tailored Impact Statement Guidelines to focus effort on key aspects of a project. The scoping of Indigenous engagement has also been broad and generic, without focus on Indigenous groups directly affected by a project. The experience of a project is highly dependent on the interaction between the IAA and the relevant provincial assessment process.

While experience with the IAA is currently limited to the first phase of the process, the IAA has retained the substantive structure of CEAA 2012. Thus, the potential effects of elements common with CEAA 2012 can be evaluated. The IAA has maintained triggering through a Project List, mandated timelines, and a stand-alone decision with conditions, while expanding the scope of assessment and decision criteria.

It would be very helpful to us if the Supreme Court of Canada can provide clarity and guidance regarding the jurisdictional underpinning of conditions imposed by CEAA 2012/IAA for the lifetime of a mining project and the approach to the consideration of cumulative effects.

9. Conditions and post-assessment regulators

CEAA 2012 created a stand-alone decision with conditions, an approach continued in the IAA. Yet, the IAA, applied to a narrow subset of activities, cannot be the sole means of managing adverse effects on federal jurisdiction.

In paragraph 2 and other places of its Factum to the Alberta Court of Appeal, Canada states that: "the *IAA* provides the decision-maker with the capacity to mitigate those adverse effects on areas of federal jurisdiction through the creation of conditions", implying that conditions imposed are limited to areas of federal jurisdiction. However, in practice, the Agency has imposed conditions which are difficult to reconcile with the stated areas of federal jurisdiction. When questioned, the Agency has explained that it has a duty to impose conditions that guarantee everything that the Minister or Cabinet considered in their decision. In other words, the conditions can extend beyond the limits of adverse federal effects.

For example, conditions imposed by CEAA 2012 decisions routinely included requirements related to ambient air quality. It is difficult to understand how ambient air quality, which is a local issue, becomes subject to federal jurisdiction, and why such an impact would be pursued for sources of air pollution

that are designated under the IAA and not for projects that are subject to compliance with the *Fisheries Act*, *Species at Risk Act, Migratory Bird Conventions Act,* etc.

Governments have various ways of assessing and regulating activities. Generally, an environmental or impact assessment is used to inform whether a project should proceed, but the regulation of the project over its lifetime is left to a primary regulator(s). The primary regulator takes the assessment report into account, but can adjust requirements over time as technology, science and societal norms evolve. Under CEAA 1992, the EA informed the decision by the authority which issued a permit or provided funding or land. Under CEAA 2012, environmental assessment and permitting were integrated in the respective federal regulator in the case of projects wholly in federal jurisdiction, such as inter-provincial pipelines. However, for projects such as mining, the Agency was left to impose and enforce conditions for the life of a mining project even though it is not a mining regulator.

IAA conditions imposed for the life of a project now turn the Agency into another lifetime regulator. In the case of a mining project, that life is measured in decades from construction through decommissioning. There has been no indication so far how the Agency would discharge that obligation, which will accumulate over time as more project decisions are made and conditions imposed.

Aside from questions of the Agency's capacity and expertise, this approach raises concerns about potential conflict and divergence over time between the CEAA 2012/IAA conditions and those imposed by the province. While the IAA has introduced the ability to amend conditions, it will be up to the proponent to convince the two levels of government to align their requirements.

10. Consideration of cumulative effects

Consideration of cumulative effects is important and is not being questioned. However, the intent of considering cumulative effects should be to manage them to prevent harm. If an IAA assessment is intended to assess and address adverse effects on areas of federal jurisdiction and the extent to which they are significant (para 2 and elsewhere), it is confusing that Canada would elect to address these effects only for the narrow (relative to the many other human activities not subject to the Act that contribute to such effects) and somewhat arbitrary set of IAA designated projects. The federal government either does or does not have jurisdiction and the means to address harm from cumulative effects.

The experience of the Murray River project caused us confusion. The CEAA 2012 project decision was held up because the assessment concluded there would be significant adverse effects based on cumulative effects on Southern Mountain caribou habitat. The cumulative adverse effects on Southern Mountain caribou habitat were already significant and continued to increase while the project waited for a Cabinet decision. The project's impact on caribou habitat would be small and unlikely, and the proponent offered an offset. The federal government had maintained in previous discussions with MAC that critical habitat of terrestrial species on provincial crown land is provincial jurisdiction and took no action to prevent the previous or new disturbance of that habitat yet insisted that a Cabinet decision was required whether the effect of the proposed mine was justified.

If a CEAA 2012 decision was based on "adverse effects on areas of federal jurisdiction", then the conclusion of the assessment of Murray River should have been different, or Canada should have acted on other activities, some in sole federal jurisdiction, impacting the same habitat. In short, improvement is required in better tuning the outcomes of cumulative effects assessments in project decisions towards provisions both reasonable and meaningfully appropriate to the project assessed versus expansive regional issues best attended to via the available mechanism of regional assessments.

11. Summary

The transition to a low carbon economy, as well as changing technology and geopolitical stresses, require the expeditious development of new mining and energy generation and infrastructure projects. There is a broad consensus that the timeline for the planning and approval process (including "no go") has to be shortened without losing the essential planning requirements for environmental protection and Indigenous consultation.

Canadian mineral products – as the building blocks of the clean economy – are among the lowest carbon intensive in the world. Critical minerals production in Canada yields a lower supply-chain carbon-intensity finished product than most alternative raw material sources globally. With its clean electricity advantage applied across a sought after up- and down-stream supply-chain, Canada has the potential to produce the lowest carbon intensity EV and clean technology on a life-cycle basis anywhere. To do so, however, the mining and metal manufacturing industry needs to be scaled larger to meet projected demand. Mining projects have been a central part of federal EA/IA. It is hoped that the issues and challenges described above will provide some context for the constitutional debate that will occur before the Supreme Court of Canada and lead to solutions going forward that better reflect the long-stated goal of "one project one assessment".

[i] The Mining Association of Canada (MAC) is the national organization representing the Canadian mining industry, comprising companies engaged in mineral exploration, mining, smelting, refining and semi-fabrication. Since 1935, MAC has been the national voice of the Canadian mining industry. Our members account for the majority of Canada's production of base and precious metals, uranium, diamonds, metallurgical coal, and mined oil sands.

[iiii] Impact Assessment Agency Registry as of August 2022 shows 140 comprehensive studies of which 33 are Mines and Minerals.

[iii] Impact Assessment Agency Registry as of August 2022 shows that Fisheries and Oceans Canada was a Responsible Authority for 29 of 33 comprehensive studies of Mines and Minerals.