Supreme Court finds Federal Impact Assessment Act Unconstitutional

October 13, 2023

Introduction

On October 13, 2023, the Supreme Court of Canada (SCC) issued its highly anticipated decision[1] (the Decision) on the constitutionality of the federal *Impact Assessment Act*[2] (IAA) and *Physical Activities Regulations*[3] (Regulations).

A majority of the SCC held that the IAA was "essentially two schemes in one",[4] and that although "a discrete portion of the scheme"[5] related to the regulation of "activities on federal lands or outside of Canada" was constitutional (the Federal Projects Scheme),[6] the balance of the Act related to the regulation of designated projects "plainly overstepped [Parliament's] legislative competence" (the Designated Projects Scheme).[7]

The Decision represents a major victory for Alberta and several other provinces who, from the IAA's inception, argued that it impermissibly intruded into provincial jurisdiction and introduced additional delays and uncertainty into Canada's regulatory approval process.

Brett Carlson, Aidan Paul and Peter Banks acted as counsel for the intervener, the Canadian Constitution Foundation.

Background

In June 2019, the federal government introduced the IAA, which replaced the *Canadian Environmental Assessment Act* 2012. The new act sparked significant controversy in Western Canada, which culminated in Alberta launching a constitutional reference before the Alberta Court of Appeal (ABCA).

The core of the IAA is the Designated Projects Scheme, which permits a federal Minister to designate certain projects or activities under the Regulations, which are then automatically prohibited pursuant to section 7 of the IAA, if they "may cause effects within federal jurisdiction" (the "Project Prohibition").[8] The Project Prohibition remains in place unless and until the federal agency determines that a prohibited project: (1) does not require an impact assessment; or (2) the project proponent complies with conditions

imposed following an impact assessment.[9] Notably, the Project Prohibition and other mechanisms under the IAA are triggered by "effects within federal jurisdiction", which is broadly defined to include various environmental, socioeconomic, and health-related effects that many argued are not in fact within federal jurisdiction.[10]

The Alberta Court of Appeal held that the IAA and Regulations could not be upheld under any federal heads of power, including the federal POGG power.[11] Instead, the majority[12] found that the IAA fell "squarely within several heads of provincial power", including provincial powers over: (1) natural resources (section 92A); (2) the management of public lands (section 92(5)); (3) local works and undertakings (section 92(1)); and (4) property and civil rights (section 92(13)).[13]

Canada's appeal was heard by the SCC on March 21-22, 2023. A total of 29 parties were granted leave to intervene, which consisted of: (1) 7 provinces; and (2) 22 non-governmental interveners, including various civil liberties organizations, industry groups and environmental interest groups.

Majority decision

A majority of the SCC found that although the Federal Projects Scheme was constitutional, Parliament "plainly overstepped its constitutional competence"[14] in enacting the Designated Projects Scheme.

At the first stage of the constitutional analysis, the majority characterized the two schemes contained in the IAA separately, finding that:

- the pith and substance of the Designated Projects Scheme was to "assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts";[15] and
- the pith and substance of the Federal Projects Scheme was to "direct the manner in which federal authorities that carry out or finance a project on federal lands or outside Canada assess the significant adverse environmental effects that the project may have."[16]

At the second stage of the constitutional analysis, the majority classified the two distinct schemes set out in the IAA under the heads of power assigned to the federal and provincial governments under the *Constitution*, finding that:

- the Designated Projects Scheme was *unconstitutional* because "effects within federal jurisdiction": (1) do not "drive the scheme's decision-making functions";[17] and (2) their "overbreadth further dilutes the scheme's already tenuous focus on the federal aspects of designated projects";[18] and
- in contrast, the Federal Projects Scheme resembled the environmental assessment regime that was previously upheld in *Oldman River*[19] and was "clearly"[20] constitutional.

Ultimately, the majority held that the Federal Projects Scheme could be severed from the unconstitutional Designated Projects Scheme. As a result, the Federal Projects Scheme remains in force and effect.[21]

The majority concluded by noting that "there is no doubt that Parliament can enact impact assessment legislation", but that the Designated Projects Scheme "plainly overstepped the mark".[22] However, the Court noted that Parliament is free to "design environmental legislation, so long as it respects the division of powers" and to work with provincial legislatures to "exercise their respective powers over the environment harmoniously, in the spirit of cooperative federalism."[23]

Dissent

In a dissenting opinion, Justices Karakatsanis and Jamal were of the view that the IAA and Regulations were constitutional in their entirety.[24]

In reaching this conclusion, the dissenting justices characterized the pith and substance of the Designated Projects Scheme as "establish[ing] an environmental assessment process" to: (1) assess the effects of physical activities or major projects on various matters falling within federal jurisdiction or where those effects are international or extraprovincial; and (2) determine whether to impose restrictions on such projects to safeguard against such adverse federal effects.[25]

Based on this characterization, the dissenting justices were of the view that the Designated Projects Scheme's was anchored to multiple federal heads of power by its focus on "adverse federal effects", rendering it constitutional.[26]

Implications

The Decision marks a significant development in the constitutional law regarding federal authority over environmental assessments, which has not been thoroughly considered since the SCC's decision in *Oldman River*.[27] In doing so, the Decision confirms that the federal environmental assessments must be clearly rooted in federal heads of power and cannot "veer towards regulating [a] project *qua* project or evaluating the wisdom" of same.[28]

Crucially, the Decision marks a major step in the recent saga of constitutional cases etching out provincial and federal jurisdiction over the environment and sends a clear signal that the federal government must respect provincial legislative competence in that sphere. As a result, the Decision will almost certainly impact future constitutional challenges regarding environmental matters, including any challenge of the federal government's proposed cap on oil and gas emissions.

Finally, it is important to note that the Decision was a non-binding advisory reference case and Canada has already confirmed that it intends to table amendments in an attempt to rectify the unconstitutional provisions of the IAA. For existing permit holders, or those who are currently undergoing an impact assessment, the effect of the SCC's Decision may depend on such future amendments. Notwithstanding this near-term uncertainty, the Decision will bring considerable clarity to the regulatory environment faced by project proponents and resource market participants, who are likely to experience greater regulatory transparency, certainty, and investor confidence going forward.

Footnotes

[1] *Reference re Impact Assessment Act,* 2023 SCC 23 *[*Decision*].*
[2] *Impact Assessment Act,* SC 2019*,* c 28, s 1 *[*IAA*],*
[3] *Physical Activities Regulations, SOR/2019-285 [*Regulations*].*
[4] *Decision* at para 5.
[5] *Decision* at para 5.
[6] *Decision* at para 6.
[7] *Decision* at para 6.
[8] *IAA,* s 7*.*
[9] *IAA,* s 16(1).
[10] *IAA*, s 2.
[11] *Reference re Impact Assessment Act, 2022* ABCA 165 at para 425 *[*ABCA Decision*].*
[12] In dissent, Justice Greckol would have upheld the *IAA* and *Regulations* as a "valid exercise of Parliament's authority to legislate on the matter of the environment." Justice Greckol was of the view that although the IAA and Regulations applied to intra-provincial projects, which *prima facie* fell under provincial heads of power, they were nevertheless constitutional because they targeted adverse environmental effects in federal jurisdiction.
[13] *ABCA Decision* at paras 409-420*.* Justice Strekaf concurred with the Majority's analysis and conclusions, with the exception of its conclusion that the *IAA* and *Regulations* amounts to a *de facto* federal expropriation of provincial natural resources.
[14] *Decision* at para 6.
[15] *Decision* at para 76.
[16] *Decision* at para 76.
[17] *Decision* at para 135.
[18] *Decision* at para 138.
[19] *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3.
[20] *Decision* at para 130.
[21] *Decision* at para 211.
[22] *Decision* at para 216*.*
[23] *Decision* at para 216.
[24] *Decision* at para 361*.*
[25] *Decision* at para 257.
[26] *Decision* at para 304.
[27] *Friends of the Oldman River Society v Canada (Minister of Transport),*1992] 1 SCR 3*.*
[28] *Decision* at para 206.

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