Cassels

Alberta Court of Appeal: Climate Change Not a Basis "to Tear Apart the Constitutional Division of Powers"

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On May 11, 2022, the Alberta Court of Appeal held in a reference case that the *Impact Assessment Act* (IAA) and its accompanying *Physical Activities Regulations* are unconstitutional.[1]

Fundamentally, this reference case grapples with the question: when is a federal environmental assessment necessary? The Alberta Court of Appeal determined that the IAA is unconstitutional based on its view that effects on federal jurisdiction is not enough—the federal government must have some valid decision-making authority over the project itself to avoid unreasonably intruding into areas of exclusive provincial jurisdiction.

This reference case is almost certainly headed to the Supreme Court of Canada. The federal government has confirmed that it considers the decision "advisory in nature" and that the IAA will remain in effect.[2] However, some of the consequences will be felt now, as proponents face greater uncertainty regarding their federal environmental assessment obligations until the constitutionality of the IAA is resolved.

No More "No More Pipelines Act"?

Bill C-69, which received royal assent in June 2019, enacted the IAA. The IAA, which Premier Kenney has dubbed the "No More Pipelines Act," establishes various types of federal assessments for projects, depending on whether or not the project meets the criteria of a "Designated Project." If a federal assessment is required, the Impact Assessment Agency, a Joint Review Panel established under the IAA, or the relevant federal agency, as appropriate, will conduct the assessment to determine the environmental effects of the project. Where the authority determines that the project is likely to result in significant adverse environmental impacts, the Governor in Council may decide that those effects are justified under the circumstances.

The Government of Alberta challenged the IAA's constitutionality in September 2019, arguing in a reference to the Alberta Court of Appeal that it was an overreach of federal jurisdiction that "threatens to eviscerate provincial authority over resource development." In Alberta's view, the Act goes well beyond what is required to protect the environment. The IAA remains in effect and the federal government has indicated that it is appealing the decision to the Supreme Court of Canada.[3]

Climate Change and the Constitutional Division of Powers

In its division of powers, the *Constitution Act, 1867* does not assign the environment to either Parliament or provincial Legislatures. Parliament can pass environmental legislation in an area of federal jurisdiction (e.g., fisheries or matters of national concern). The federal government argued at the Court of Appeal that the IAA relates to multiple areas within federal jurisdiction. Alberta argued that the IAA provided an "effective federal veto" over the development of natural resources, which is an area within provincial jurisdiction.[4]

As we previously discussed, courts use a two-stage analysis to determine if legislation is constitutionally valid. In the first stage, the Court is required to identify the dominant characteristics of the challenged law, while in the second stage, the Court must determine whether these characteristics are within federal or provincial jurisdiction.

In this case, the Court of Appeal held that the IAA's dominant characteristic was to regulate any activity the federal government decided to subject to federal oversight and approval.[5] The Court of Appeal went on to note that the IAA seemed to target activities that generate greenhouse gas emissions—an extremely broad characterization that it viewed as federal overreach. In making this point, the Court examined a hypothetical project completely within provincial borders that would not require any federal permits (referred to as an "intra-provincial activity"). The Court reasoned that the IAA would allow the federal Minister of the Environment to select this type of project for a federal assessment so long as the project produces adverse effects within federal jurisdiction,[6] even if those effects are only incidental.[7]

Impacts on Indigenous Groups

The Court of Appeal's opinion also noted that the IAA could undermine Indigenous self-governance or affect project benefits for consenting Indigenous groups. The Court of Appeal referenced its previous decision that economic development on reserve lands is in the public interest.[8] It noted that the IAA elevates the Federal Government's concept of the public interest above the courts' or provincial governments', or the rights of Indigenous peoples to make their own agreements with proponents.

Dissent

Justice Greckol dissented, holding that the dominant characteristic of the IAA was establishing a regime to facilitate planning and information gathering to inform cooperative decision-making between jurisdictions. For the dissent, the IAA is a valid exercise of Parliament's authority because its regime is intended, designed, and operationally limited to adverse effects within federal jurisdiction.[9]

Implications

The *Constitution Act, 1867* establishes the environment as an area of shared jurisdiction between the provinces in the federal government. This shared jurisdiction makes sense given that certain provincial mandates (e.g., natural resources) and federal mandates (e.g., fisheries) could both be impacted by government decisions to approve projects with potential effects on the environment.

For resource development and infrastructure projects, it is not always straightforward to determine if a federal environmental assessment is triggered. Historically, some projects have been customized to optimize the review process—for example by scoping the project to fall below established thresholds in the *Physical Activities Regulations* (or project list) for federal review.

The concept of a project list adopted by IAA, and its predecessor legislation the *Canadian Environmental Assessment Act*, *2012*,[10] was intended to give proponents greater certainty about whether a federal environmental assessment is required. Requiring a federal environmental assessment, often in addition to a provincial environmental assessment, typically increases the complexity, cost, and length of the review. Our experience is that federal-provincial environmental assessments can take years to complete. This delay and resulting uncertainty were the Alberta Court of Appeal's primary concerns for federal environmental assessments of intra-provincial projects.

Alberta's top court now considers Canada's federal environmental assessment law unconstitutional and the federal government disagrees. Until resolved by the Supreme Court of Canada or governments, this reference decision will increase uncertainty for federal environmental assessments of intra-provincial projects.

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[1] *Impact Assessment Act*, SC 2019, c 28 [IAA].

[2] https://www.cbc.ca/news/canada/calgary/appeal-court-alberta-federal-assessment-act-ruling-1.6447868

[3] CBC Power & Politics, "Federal government says it will appeal top Alberta court ruling on Bill C-69," *CBC News* (10 May 2022), online (video): <cbc.ca/player/play/2031763011815>.

[4] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 245 [IAA Reference].

[5] IAA Reference at para 290.

[6] IAA, s 9(1).

[7] IAA Reference at paras 218, 226.

[8] See our previous update on this topic: Positive Economic Impacts for First Nations are Relevant for Decision-makers.

[9] IAA Reference at paras 610-611.

[10] S.C. 2012, c. 19, s. 52.

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