Cassels

What Now? The Supreme Court of Canada Finds the Federal Impact Assessment Act Largely Unconstitutional

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Jurisdiction over the environment is shared between the federal and provincial governments under the Canadian constitution. In recent decades, the federal government has attempted to promote environmental protection, while expanding its overview of environmental assessments in a manner it believed was consistent with the constitutional division of powers. On October 13, 2023, the Supreme Court of Canada (SCC) released its judgment on the *Reference re Impact Assessment Act* (Decision).[1] The Decision of the majority confirms that the federal government's new impact assessment regime is largely unconstitutional and goes beyond Parliament's constitutional authority.

The *Impact Assessment Act*[2] and *Physical Activities Regulations* (*Regulations*)[3] include an impact assessment process for "designated projects," which require federal approval for listed projects. Sections 81 to 91 of the *Impact Assessment Act* include a separate regime related to projects on federal lands and projects outside of Canada, within the jurisdiction of the federal government. A 5-2 SCC majority held that the designated projects scheme of the *Impact Assessment Act* and *Regulations* is outside the jurisdiction of the federal government and therefore unconstitutional. The majority did find that sections 81 to 91 of the *Impact Assessment Act* are within the jurisdiction of the federal government because they apply to projects on federal lands and projects outside of Canada.

The federal government accepted the results and advised that it intends to provide guidance to stakeholders for affected projects.[4]

BACKGROUND

Impact Assessment Act Legislative Scheme

The *Impact Assessment Act* "is essentially two acts in one."[5]

1. A "designated projects" scheme,[6] which prohibits project proponents from undertaking physical activities relating to "designated projects" that may cause adverse "effects within federal jurisdiction" until it can be determined by the Minister whether those effects are in the public interest.[7] The Minister may bring an activity that is not prescribed by the *Regulations* within the *Impact Assessment Act*'s review scheme by designating the project if, in his or her opinion, the

physical activity may cause adverse effects within federal jurisdiction, or public concerns related to those effects warrant the designation.[8]

2. A more discrete scheme, found in section 81-91, that regulates federal decision making with respect to projects that are carried out on federal lands or outside Canada, which are not "designated projects" under the *Regulations*.[9]

Designated projects can be activities that are subject to provincial environmental review. Some examples include hydroelectric dams, mine and metal mills, oil sand facilities, and hazardous waste storage.[10] Designation of a project for a federal impact assessment can result in project delays of indeterminate duration,[11] together with the expenditure of resources by the project proponent, federal authorities, and other implicated jurisdictions.[12]

Alberta Court of Appeal Finds the Impact Assessment Act Unconstitutional

The Government of Alberta challenged the *Impact Assessment Act*'s constitutionality in September 2019, 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."[13] On May 11, 2022, a majority of the Alberta Court of Appeal concluded that the *Impact Assessment Act* and *Regulations* were outside of federal jurisdiction and unconstitutional in their entirety (see our previous update).[14]

SUPREME COURT OF CANADA DECISION

The SCC majority stated at the outset that Canada does have the authority to legislate with respect to environmental protection and impact assessment.[15] However, the majority concluded that the *Impact Assessment Act* oversteps Parliament's constitutional limits by enacting legislation that does not fall clearly under a federal head of power. The *Constitution Act, 1867*, lists matters, or heads of power, that may be regulated by the provinces (including local works and undertakings and natural resources) and by Parliament (including fisheries, navigable waters, "Indians, and Lands reserved for the Indians," and matters of national concern under the "peace, order and good governance" power).[16] Classifying environmental legislation has always challenged the Courts, because the "environment" is not a distinct head of power.[17] As a result, it is first necessary to characterize the *Impact Assessment Act* by determining its purpose and effects, after which it is possible to classify which head of power the law best falls under.

The majority determined that the designated projects scheme of the *Impact Assessment Act* does not align with federal legislative jurisdiction and is therefore unconstitutional. The Court did find that the *Impact Assessment Act* scheme for projects located on federal lands or located outside of Canada falls within the legislative authority of Parliament. The majority came to these conclusions for the following reasons:

1. The pith and substance of the designated projects scheme is to assess and regulate designated projects to reduce their adverse impacts.[18] The scheme's key decisions of whether an impact assessment is needed, and whether a project's effects are in the public interest, are not driven by an assessment of effects within federal jurisdiction.[19] Consequently, the scheme is not directed at regulating adverse effects within federal jurisdiction, and cannot be classified under a federal head of power.[20]

2. The pith and substance of the scheme found in sections 81 to 91 is 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.[21] This scheme clearly falls under federal legislative authority and is upheld as constitutionally valid.[22]

The majority also notes that the term "effects within federal jurisdiction" as defined in the *Impact Assessment Act*, extends beyond federal jurisdiction. This is problematic because this defined term forms the basis of decision making and prohibitions under the scheme.[23] To illustrate this, the Court gives the example of a change to the environment that occurs in a different province other than the province in which the project is located. As defined in the *Impact Assessment Act*, a change to the environment could be a change to any component of the earth including greenhouse gas emissions that will cross provincial borders.[24] The majority notes two letters from federal decision makers regarding coal and oilsands projects in which the sole unacceptable environmental effects were greenhouse gas emissions.[25] However, greenhouse gas emissions do not fall under a federal head of power.[26] The majority found that the overbreadth of effects regulated by the scheme also results in an overly broad ability of the scheme to prohibit projects from proceeding, possibly indefinitely, on the basis of potential for those effects.[27]

Dissent

Justice Jamal and Karakatsanis offered a dissenting decision concluding that the *Impact Assessment Act* and *Regulations* are within the legislative authority of Parliament. The minority characterizes the pith and substance of the *Impact Assessment Act* as establishing an environmental process to: 1) assess the effects of projects on a discrete list of factors including federal lands, Indigenous peoples, fisheries, and effects that cross provincial or national boundaries; and 2) determine whether to impose restrictions on the project to safeguard against those effects that are not in the public interest.[28] This characterization allowed the minority to classify the designated projects scheme under federal heads of power and conclude that the *Impact Assessment Act* and *Regulations* are constitutional.

Implications for Industry, Government, and Indigenous Communities

This is a landmark decision that will significantly affect current and future federal impact assessments. In the interim, there will be uncertainty regarding the assessment and regulatory process for designated projects

until the amendments to the *Impact Assessment Act* are complete. The Decision may embolden provinces to challenge other federal environmental regulations.

Federal Government

As a reference question, the Decision does not automatically strike down the *Impact Assessment Act*.[29] The majority leaves it open to Parliament to go back to the drawing board to design environmental legislation that respects the division of powers in cooperation with the province.[30] In a statement provided by Minister of Environment and Climate Change Steven Guilbeault and Minister of Justice and Attorney General of Canada Arif Virani, the federal government has indicated that their "immediate priority will be to provide guidance to our many stakeholders and Indigenous partners to ensure as much predictability as possible for projects affected by this opinion."[31] While we expect that future amendments to the *Impact Assessment Act* and *Regulations* will incorporate the SCC's findings, it remains to be seen whether this means an overhaul or minor amendments. The first order of business for the federal government will be determining how to address the 23 projects currently in the impact assessment process.[32]

Provincial Governments

It remains to be seen whether amendment to the *Impact Assessment Act* will reduce or eliminate federal review of categories of projects that are subject to provincial assessments. The Government of Alberta broadly interpreted that the Decision "significantly strengthens our province's legal position as we work to protect Albertans from federal intrusion into various areas of sovereign provincial jurisdiction."[33] Alberta references the forthcoming federal *Clean Electricity Regulations*[34] and oil and gas emissions cap under the *Canadian Environmental Protection Act*[35] as other potentially "unconstitutional federal efforts."

The Ontario government also objected to the designation of Highway 413 as an intra-provincial highway project subject to federal assessment under the *Impact Assessment Act*, as discussed in our recent update. We expect that provinces opposing federal impact assessments will be emboldened by the Decision. However, the federal government has successfully defended other environmental legislation against provincial challenges before the SCC, including its carbon-tax backstop the *Greenhouse Gas Pollution Pricing Act*[36] (see our update).

Industry

For decades, Canada's federal environmental assessment regime has tried to balance certainty for project proponents with a robust process for all stakeholders to consider the environmental impacts of federal government decisions. The fact that Canada's federal impact assessment regime is largely unconstitutional

will increase short term uncertainty. The Decision might result in project proponents delaying or avoiding applications, delaying projects, or avoiding triggering a federal assessment while the legislation is amended. Swift guidance is required for the 23 project proponents currently in the impact assessment process.

The process for determining whether a federal environmental assessment is required has shifted from a decision-based trigger under the *Canadian Environmental Assessment Act, 1992*[37] to a primarily project-based trigger under the *Canadian Environmental Assessment Act, 2012*[38] and *Impact Assessment Act.* The designated project regime — and importantly the designated project list under the *Regulations,* which received substantial feedback from industry and stakeholders[39] — was found unconstitutional. Project proponents will have concerns regarding the future and content of a process that has a project-based trigger under any future amendments to the *Impact Assessment Act.*

Indigenous Communities

Indigenous communities will have concerns regarding the portions of the *Impact Assessment Act* that are now in question as the federal government considers amendments. Section 7 of *Impact Assessment Act* contains a strict prohibition on projects that have a potential to cause adverse effects on Indigenous lands, health, culture, and economic conditions.[40] The Decision states that the blanket prohibitions in section 7 of the *Impact Assessment Act* are outside the scope of the federal government's authority.[41]

Given the duty to consult obligation of the Crown prior to project approval, it remains to be seen whether removing or altering the prohibitions listed in section 7 of the *Impact Assessment Act* will diminish protections for Indigenous peoples in Canada. We expect Indigenous communities will seek to be engaged by the federal government with respect to the amendments to the *Impact Assessment Act,* including protections in section 7.

Stay Tuned!

Join experts from our Environmental, Regulatory, and Aboriginal Law Groups on November 2, 2023, as they provide an overview of the Supreme Court of Canada's landmark decision in reference to the *Impact Assessment Act*. Contact us for more information.

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[1] *Reference re Impact Assessment Act,* 2023 SCC 23 [Decision].

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

[3] SOR/2019-285 [*Regulations*].

[4] Impact Assessment Agency, "Statement by Ministers Guilbeault and Virani on the Supreme Court of Canada's opinion on the constitutionality of the *Impact Assessment Act,*" Ottawa (2023).

[5] Decision, at para 32.

[6] *IAA*, s 2.

[7] *IAA*, s 2.

[8] *IAA*, 9(1); Decision at para 93.

[9] *IAA,* ss 81 – 91.

[10] *Regulations,* ss 42(a), 18, 32, 56.

[11] Decision, at para 106.

[12] Decision, at para 107.

[13] Decision, at para 32.

[14] J Barretto et al, *Alberta Court of Appeal: Climate Change Not a Basis to "Tear Apart the Constitutional Division of Powers"* (2022).

[15] Decision, at paras 3, 206.

[16] See *The Constitution Act, 1867*, 30 & 31 Vict, c 3, at ss 91, 92, and 92A [*Constitution Act, 1867*].

[17] Decision, at paras 114-116, and citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at pp 63-64.

[18] Decision, at para 109.

[19] Decision, at para 135.

[20] Decision, at paras 135, 204.

[21] Decision, at paras 76 and 109.

[22] Decision, at paras 207-211.

[23] Decision, at paras 179-180.

[24] Decision, at paras 183-184.

[25] Decision, at para 188.

[26] Decision, at paras 185-186, and citing *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[27] Decision, at paras 190-191, 194.

[28] Decision, at para 257.

[29] Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law," in William R Lederman ed, *The Courts and the Canadian Constitution* (McClelland & Stewart, 1964) at 169.

[30] Decision, at para 216.

[31] Impact Assessment Agency, "Statement by Ministers Guilbeault and Virani on the Supreme Court of Canada's opinion on the constitutionality of the *Impact Assessment Act,*" Ottawa (2023).

[32] Impact Assessment Agency, "Statement by Ministers Guilbeault and Virani on the Supreme Court of Canada's opinion on the constitutionality of the *Impact Assessment Act,*" Ottawa (2023).

[33] Government of Alberta, "Supreme Court of Canada ruling: Joint statement, Edmonton (2023).

[34] Canada Gazette, Part I, Volume 157, Number 33: Clean Electricity Regulations.

[35] *Canadian Environmental Protection Act, 1999,* SC 1999 c 33.

[36] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

[37] *Canadian Environmental Assessment Act,* SC 1992, c 37 [*CEAA* 1992].

[38] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*].

[39] Impact Assessment Agency of Canada, "Let's talk impact assessment: Submissions – Discussion Paper on the Proposed Project List (2019).

[40] *IAA,* s 7. Unlike the *Impact Assessment Act,* the *CEAA 2012* lacks the prohibitions listed in section 7 of the *Impact Assessment Act*.

[41] Decision, at para 200.

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