CANADA'S SUPREME COURT FINDS *IMPACT ASSESSMENT ACT* UNCONSTITUTIONAL

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Introduction

On October 13, 2023, in a 5–2 split decision, the Supreme Court of Canada (SCC) found Canada's federal *Impact Assessment Act* (IAA) to be, in part, unconstitutional in *Reference re Impact Assessment Act*. The SCC's decision is the culmination of three years of legal proceedings, beginning with the constitutional challenge initiated by the government of Alberta in 2000 before the Court of Appeal of Alberta (CAA). The IAA, which came into force in August 2019, has long been criticized by resource-rich Alberta for imposing unrealistic standards, undermining future investments, and more generally presenting an unacceptable intrusion into exclusive provincial legislative jurisdiction.

Part 1: The IAA Before the Court of Appeal of Alberta

Canadian Federalism 101

The legislative authority afforded to Canadian federal and provincial governments has been delineated pursuant to the *Constitution Act, 1867*. Canadian jurisprudence has confirmed that no level of government has been granted exclusive jurisdiction to legislate over the "environment," with the result that both levels of government may enact environmental legislation, so long as such legislation does not encroach on matters falling exclusively within the jurisdiction of the other level of government. For example, provinces have powers over natural resources.

A Constitutional Trojan Horse

Alberta, Canada's largest oil and gas producing province, challenged the constitutional validity of the IAA before the CAA on the grounds that the IAA, and the list of project types requiring an impact assessment that are designated by regulation (Projects List), constitute an illegitimate intrusion into provincial legislative jurisdiction, and a threat to Canadian federalism.

Alberta alleged that the broad range of factors to be considered by the Impact Assessment Agency of Canada (Agency) when assessing a designated project—such as in situ oil sands projects—grants the federal government a power to veto projects that are in the provincial public interest. In particular, mandatory (albeit aspirational) factors, such as the contribution of a project to sustainability or to the federal government's climate change commitments, were criticized as imposing requirements on project that were ultra vires of the federal government's authority.

The CAA agreed, holding that the IAA and the Projects List are unconstitutional in their entirety. In explaining the grounds for their decision, the CAA noted that Parliament is not entitled to "require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction on the basis of the environmental effects of those projects, and factors, not linked or not sufficiently linked, to a federal head of power." According to the CAA, the broad list of factors that must be taken into consideration during an impact assessment, and during the subsequent "public interest" determination that is the final stage of the assessment process, would result in placing all provincial industries, and nearly every aspect of a province's economy (including the development of the province's natural resources) under federal control.

Part 2: The SCC Weighs In

The appeal to the SCC, initiated on an as-of-right basis by the Attorney General of Canada, provided the SCC with the opportunity to provide its view on the constitutionality of the IAA and the Projects List, although in the context of an appeal from a provincial reference decision, the SCC had no authority to strike down the law.

The SCC began its analysis by explaining that the IAA is "essentially two acts in one," with separate "schemes" to address (1) major projects that are designated pursuant to the Project List (Designated Projects), and that are automatically subject to the IAA; and (2) non-designated activities with the involvement of a federal authority (taking place on federal lands or outside of Canada). As discussed below, the SCC's decision concludes that only the IAA scheme with respect to Designated Projects is unconstitutional (leaving the activities of federal authorities as is under the IAA).

Finding of Unconstitutionality

The SCC confirmed that the federal government has the authority to enact impact assessment legislation and found that shared responsibility between federal and provincial governments for environmental impact assessment was a central feature in environmental decision making in Canada. However, the SCC concluded that, for such legislation to be constitutional, it must be directed at the federal aspects of the projects to which such legislation relates. With regard to the IAA, the SCC found that two of the four stages of the Designated Projects scheme were unconstitutional, as follows:

1. Several of the factors to be considered when making the preliminary screening decision regarding Designated Projects[1] are not, as they need to be, related to potential adverse federal effects. For example, the IAA allows for the screening of Designated Projects to be made on the basis of "any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted," regardless of whether such comments relate to potential adverse federal effects.
2. Similarly, the SCC concluded that the final, "decision-making" stage of the IAA process for Designated Projects had been expanded beyond the test of whether a project is likely to cause significant adverse environmental effects. Under the IAA, the federal government would determine if such effects are in the "public interest," a determination that could be based on considerations having no connection to or an inappropriate focus on any adverse federal effects.
    - For example, the IAA would allow such a public interest decision to be based on the extent to which a Designated Project contributes to sustainability, a concept that the SCC characterized as abstract and encompassing all environmental, social, and economic effects, rather than only those properly falling within federal jurisdiction.
    - As well, specific attention was given by the SCC to carbon-intensive Designated Projects, such as oil and gas projects. The risk of a public interest determination

[1] Pursuant to s.16(2) of the IAA.

being made primarily on the extent of the project's greenhouse gas emissions was a specific concern. The SCC was explicit that the IAA cannot be used by the federal government as an indirect means to enact a climate change scheme that would override provincial authority over air emissions. Where the SCC previously allowed the federal government to enact climate change rules that act as a "backstop" to provincial carbon pricing regulations,[2] the SCC's IAA decision suggests that very little, if any, climate change authority is permitted in conjunction with impact assessments.

The IAA's definition of "effects within federal jurisdiction" was also found to be overly broad. For example, the definition includes a change to the environment in a province other than the one where the Designated Project is being carried out. This would allow a project to be designated based solely on the fact that the project emits greenhouse gases that cross provincial borders. The SCC determined that adverse effects relating to a Designated Project's anticipated greenhouse gas emissions, including greenhouse gases that cross provincial borders, are not properly construed as adverse effects falling within federal jurisdiction (this despite the fact that inter-provincial matters are under the constitutional authority of the federal government).

On a related note, the SCC concluded that the IAA[3] subjects the proponent of a Designated Project to prohibitions that the federal government would not have jurisdiction to issue directly. More specifically, the SCC highlighted that the IAA prohibits, among other things, a proponent from doing anything that may cause a change (not necessarily a negative change) to fish and fish habitat, whereas federal *Fisheries Act* jurisprudence has confirmed that conduct prohibited under that Act must be linked to actual or potential harm to fisheries.

While concluding that the decision mechanisms related to the screening and approval of Designated Projects were unconstitutional, the SCC found no fault with the designation mechanism through which the Project List is assembled: "Even a 'provincial' project may cause effects in respect of which the federal government can properly legislate."

Part 3: Implications and Next Steps

The SCC's decision is a non-binding advisory opinion that leaves the IAA in force, notwithstanding that key elements of the scheme for the assessment of Designated Projects have been ruled unconstitutional. In a press conference, the federal Ministers of Environment and Climate Change and of Energy and Natural Resources confirmed that the federal government accepts the SCC's findings, and that (1) the IAA is already administered in a manner that is consistent with the SCC's decision; and (2) instead of wholesale changes to the IAA, "surgical" legislative amendments will be drafted.

Proponents who have had Designated Projects rejected, or limited, under the IAA to date will likely want to review those decisions to determine if any avenues of challenge are available. In this way, assessments of Designated Projects may be re-opened for reconsideration, expansion, or alteration. For Designated Projects that are currently undergoing assessments under the IAA, the Agency has committed to providing an opinion as to whether there is clear

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[2] See the SCC's 2021 decision in *Reference re Greenhouse Gas Pollution Pricing Act*.

[3] Pursuant to s.7 of the IAA.

federal jurisdiction for each assessment. Proponents in the midst of the assessment process may wish to be proactive in requesting such a review.

The SCC decision has dealt a significant blow to the federal process for project approval, raising significant delays and uncertainties at a time when the Canadian government is seeking to facilitate the transition to a net-zero economy by 2050. For example, the federal government's efforts to amend the legislation in accordance with the SCC's decision may delay the approval of Designated Projects that have a crucial role to play in advancing Canada's net-zero strategy, such as the mining of critical minerals. The atmosphere of legislative uncertainty will persist until such amendments are finalized and may slow down investment in climate-friendly projects that clearly fall within federal jurisdiction, such as the development or expansion of nuclear power plants.