Court of Appeal finds Federal Impact Assessment Act unconstitutional

May 11, 2022

Introduction

On May 10, 2022, the Alberta Court of Appeal issued its highly anticipated decision[1] (the Decision) on the constitutionality of the federal *Impact Assessment Act* (the *IAA*) and *Physical Activities Regulations* (the *Regulations*). Alberta's highest court considered complex legislative and constitutional issues and ruled that the *IAA* "would permanently alter the division of powers and forever place provincial governments in an economic chokehold controlled by the federal government."[2]

The federal government has announced its intention to appeal the Decision to the Supreme Court of Canada, which, if upheld, will have significant impacts on the regulation of designated projects and Canada's constitutional division of powers with respect to environmental assessments.

Brett Carlson acted as counsel to the Canadian Energy Pipeline Association in this Decision.

Background

In June 2019, the federal government introduced the *IAA*, which replaced the *Canadian Environmental Assessment Act* 2012. In response, the Alberta government launched a constitutional reference before the Alberta Court of Appeal, where it requested the Court's opinion on the constitutionality of the *IAA* and *Regulations*.

The *IAA* is a complex piece of federal environmental legislation that sets out when and on what terms a resource project or activity will be subject to a federal environmental impact assessment.

Put simply, the *IAA* provides for a mechanism through which the Minister may designate certain projects or activities under the *Regulations*, which are then automatically prohibited by virtue of s 7 of the *IAA* if they "may cause effects within federal jurisdiction". The section 7 prohibition applies unless and until the Agency decides under s 16(1) that the project does *not* require an impact assessment or the proponent

complies *with the conditions in the decision statement* issued for the project following an impact assessment. Crucially, the prohibition and other mechanisms under the *IAA* are governed largely by the "effects within federal jurisdiction" threshold, which is broadly defined and include potential environmental, socioeconomic, and health related effects.[3] Therefore, a key issue in the Decision was the extent to which "effects within federal jurisdiction" actually tethered the *IAA* to matters within federal jurisdiction.

Majority decision

As a starting point, the majority emphasized that the "environment" is not a head of power that has been assigned to Parliament or the Provinces under the *Constitution Act, 1867*, and accordingly, an environmental matter may have "some provincial aspects and some federal aspects".[4] However, projects will only be subject to federal environmental oversight if they are connected in some way to a federal head of power.

Drawing on these principles, the Court proceeded to "characterize" the *IAA*'s "pith and substance" in light of its purpose and its legal and practical effects. The Court concluded the "main thrust" of the *IAA* was "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval".[5] Characterized this way, the Court found that the *IAA*, "intrudes fatally into provincial jurisdiction and the provinces' proprietary rights as owners of their public lands and natural resources." In particular, and among twelve other reasons provided to support this finding,[6] the Court rejected the "self-defined effects within federal jurisdiction" trigger, and held that many of these effects were not linked, or not sufficiently linked, to a federal head of power.[7]

The Court then considered the second step of the constitutional analysis, which involved determining whether the *IAA* could be "classified" under any federal heads of power. However, the Court concluded the *IAA* did not fall under any federal heads of power, including the federal POGG power. Instead, the Court found the *IAA* fell "squarely within several heads of provincial power", including, among others : (1) natural resources (s 92A); (2) the management of public lands (s 92(5)); (3) local works and undertakings (s 92(1)); and (4) property and civil rights (s 92(13)).[8]

Ultimately, the Court concluded that the *IAA* "constitutes a profound invasion into provincial legislative jurisdiction and provincial proprietary rights"[9] which, if upheld, would result in the "centralization of the governance of Canada to the point this country would no longer be recognized as a real federation." [10]

Concurring and dissenting decisions

Justice Strekaf concurred with the majority's analysis and conclusions, with the exception of the majority's conclusion that the IAA and *Regulations* amounted to a *de facto* federal expropriation of the provinces' natural resources, on which she declined to express an opinion.

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."[11] 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.[12]

Implications

The Decision is significant for the Government of Alberta and various allied industry and Indigenous interveners. Since its inception, the *IAA* has faced fierce criticism from various provinces and resource market participants, who argued that the *IAA* introduced a high degree of regulatory uncertainty and complexity with respect to project approval and oversight. The Court echoed similar concerns and noted several practical business impacts flowing from the *IAA*, including delays and the stifling of investment.

The Decision has several important implications for the division of powers with respect to energy issues. First, it represents a major update to constitutional law regarding federal authority over environmental assessments, which had not been thoroughly considered since 1993, when the Supreme Court upheld an earlier but significantly different version of federal environmental assessment legislation. Second, the Decision contributes to a growing body of recent case law that is etching out provincial and federal jurisdictional boundaries with respect to modern environmental legislation.[13] These developments have been spurred in recent years as various levels of government have become increasingly motivated to regulate with respect to environmental issues, which has invariably led to disputes, uncertainty and judicial intervention.

Notwithstanding the majority's strong rebuke of Canada's position on the *IAA*, the Supreme Court of Canada will have the final say, given that the federal government has already announced its intention to appeal the Decision. Until then, and since the Decision was a "reference" or "advisory opinion", it is expected that the *IAA* will remain in force and effect unless and until the Decision is upheld by the Supreme Court. BLG will continue to monitor these events and report updates.

[1] *Impact Assessment Act,* 2022 ABCA 165 [*IAA*].

[2] Para 27.

[3] For example, "effects within federal jurisdiction" includes any change: related to any change: (1) occurring outside of a province for which an activity is located, (2) to the health social, or economic conditions of indigenous peoples of Canada; (3) to fish and fish habitat; (4) to migratory birds; and (5) to federal lands.

[4] Para 47, citing *Quebec (Attorney General) v Moses*, 2010 SCC 17.

[5] Para 372.

[6] See summary of reasons for overreach at para 373

[7] For example, "effects within federal jurisdiction", which includes extra-provincial effects stemming from a project, would effectively allow Canada to assert federal oversight over provinces on the sole basis that a project otherwise within its jurisdiction emits GHG emissions. Citing the Supreme Court's recent decision in Reference re *Greenhouse Gas*

Pollution Pricing Act, the Court held that Parliament does not have jurisdiction over the general regulation of GHG emissions.

[8] Paras 409-420.

[9] Para 421.

[10] Para 423.

[11] Para 740.

[12] Para 740.

[13] See, e.g., *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5; Reference re *Environmental Management Act*, 2021 SCC 1; and References re *Greenhouse Gas Pollution Pricing Act*, 2019 SCC 11.

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