Alberta Court of Appeal finds federal impact assessment regime unconstitutional

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On May 10, 2022, the Alberta Court of Appeal (the Court) issued its advisory opinion regarding the constitutional validity of the Government of Canada's (Canada) *Impact Assessment Act,* SC 2019, c 28, s 1 (*IAA*) and *Physical Activities Regulations*, SOR/2019-285 (*PA Regulations*). In a 4-1 decision, the majority opined that the *IAA* and the *PA Regulations* are unconstitutional.

The decision provides an important and timely assessment of the respective constitutional powers of provincial and federal governments to regulate and approve resource development through the lens of environmental and impact assessment.

In this Osler Update, we summarize the key aspects of the decision for proponents and businesses subject to federal environmental laws.

Background

Enacted in June 2019 as part of Bill C-69, the *IAA* creates a regime for federal assessment of the impacts of physical activities (or projects) and establishes a federal decision-making process for such activities. The *PA Regulations*, issued by federal Cabinet under the *IAA*, prescribe the list of physical activities that trigger the application of the *IAA* as "designated projects". This list of activities includes, among other things, certain new and expanded mine projects, hydroelectric projects, oil sands facilities, and oil and gas extraction, processing, and storage facilities above the prescribed production-based thresholds. Such projects are often wholly located within the borders of a province and, on that basis, primarily regulated by provincial environmental protection and assessment legislation.

The *IAA* is the latest and most comprehensive iteration of the federal environmental assessment regime in Canada. It repealed and replaced the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, which the previous federal government enacted in 2012 to replace the *Canadian Environmental Assessment Act*, SC 1992, c 37 (*CEAA 1992*). *CEAA 1992* itself replaced the previous regime provided by the 1984 *Environmental Assessment and Review Process Guidelines Order* (EARPGO). Over 30 years ago, the EARPGO survived a legal challenge in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (*Oldman River*).

In *Oldman River*, the Supreme Court of Canada (SCC) considered the scope of federal authority over the "environment", a diffuse subject matter not specifically assigned to either level of government under the Constitution. Importantly, although it upheld the EARPGO, the SCC was mindful that it must carefully scrutinize federal legislation over the environment to ensure that it is not used "as a constitutional Trojan horse enabling the federal government,

on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."

Alberta's provincial Cabinet referred the constitutional validity of the *IAA* and the *PA Regulations* to the Court on September 9, 2019. Alberta argued that the *IAA* was the Trojan horse that the SCC had in mind in *Oldman River*, created an effective federal veto over intra-provincial resource development and, on that basis, was unconstitutional. The Court heard the reference case on February 22 to 25, 2021.

The majority opinion

A majority of the Court, comprised of Chief Justice Fraser, Justice Watson, and Justice McDonald (with Justice Strekaf concurring), found the *IAA* and the *PA Regulations* to be unconstitutional. The majority's key findings relating to the proper characterization of the *IAA* and *PA Regulations* — which the majority considered together and we refer to collectively as the *IAA* — and their classification under the constitutional division of powers underpin the majority's decision.

Characterization of the *IAA* and *PA Regulations*

The majority rejected Canada's narrow characterization of the *IAA* as the establishment of a federal environmental assessment process to protect against adverse effects within federal jurisdiction. Rather, the majority concluded that the proper characterization of the *IAA* is much broader. The majority reasoned that the *IAA* establishes a federal assessment and regulatory regime that makes all activities designated by the federal executive, both those activities recognized as falling within exclusive federal jurisdiction (federal designated projects) and activities which otherwise fall within exclusive provincial jurisdiction (intra-provincial activities), subject to an assessment of all their effects and to federal oversight and approval.

Looking at the purpose and effects of the *IAA*, the majority opined that the *IAA* is a federal overreach because, among other things, it subjects intra-provincial resource development projects to a federal public interest assessment and federal veto power based on federal policies and priorities, notwithstanding that such projects may not otherwise be subject to federal decision-making or the potential adverse effects on areas of federal jurisdiction are immaterial.

Classification within federal versus provincial jurisdiction

Having characterized the *IAA*, the majority proceeded to determine that the regime's subject matter does not fall under any federal heads of constitutional authority. In doing so, the majority rejected Canada's arguments that, among other things, its authority over fisheries, "Indians, and Lands reserved for the Indians", and the national concern doctrine under peace, order and good governance applied. Rather, the majority opined that the *IAA*, as applied to intra-provincial designated projects, falls squarely within several heads of provincial power, including provincial authority over development and management of natural resources, proprietary rights as owners of public lands, local works and undertakings, management of public lands, property and civil rights, and local or private matters.

The majority held that the "environment", as a subject not assigned to either level of government in the Constitution, does not give the federal government power to regulate

intra-provincial projects, or their environmental effects, generally. Rather, for both government levels, legislation relating to the environment or environmental protection must be tied to a specific head of power under the Constitution. According to the majority:

[...] where an activity, such as an intra-provincial designated project, is otherwise within exclusive provincial jurisdiction, Parliament's jurisdiction is *limited to the environmental effects of that activity on a federal head of power*. Accordingly, the fact one aspect of the environmental effects of an intra-provincial designated project, the fisheries aspect for example, falls within federal jurisdiction does not give Parliament the jurisdiction to regulate the intra-provincial designated project itself from beginning to end. If it did, that would be a back door route to the federal government's securing what amounts to exclusive jurisdiction over the environment and all intra-provincial activities. That is because where a conflict arises between federal laws and provincial laws, under the doctrine of paramountcy, the federal law would prevail. [Para 179]

As such, the majority reasoned that the *IAA* is unconstitutional.

The dissenting opinion

In a lengthy dissent, Justice Greckol disagreed with the majority's conclusions regarding the *IAA*'s constitutional validity. Unlike the majority, Justice Greckol characterized the *IAA* and *PA Regulations* as being an assessment regime that merely facilitates planning, information-gathering, and decision-making cooperatively with other jurisdictions to determine whether effects purported to be within federal jurisdiction are in the public interest. Justice Greckol reasoned that designated projects under the *IAA* are all either activities that fall within areas of federal jurisdiction or that may have effects upon areas of federal jurisdiction, such as fish and fish habitat, aquatic species, federal lands, or Indigenous people. Justice Greckol therefore viewed both the *IAA* and the *PA Regulations* as a valid exercise of the federal government's powers.

Conclusions

This reference opinion is an important first assessment of the constitutional validity of the *IAA*. While the Court's majority opinion is an advisory opinion and does not have any immediate effect on the applicability of the *IAA*, it has the potential to fundamentally alter the scope of federal decision-making over intra-provincial projects that are not otherwise subject to federal regulation.

First, the majority's emphasis on the fact that the *IAA* triggers federal decision-making over projects with only immaterial potential effects on federal jurisdiction may have implications far beyond this reference opinion with respect to other federal decision-making powers. Even if such legislation is within federal powers, the majority's emphasis on the lack of a materiality threshold is relevant to the reasonableness of an exercise of federal jurisdiction to a particular project or activity.

Second, the majority opinion expresses particular concern regarding federal assessment extending to areas outside of federal jurisdiction and amounting to an effective veto through broad public interest assessment and decision-making. The public interest assessment is a feature of several federal statutory decision-making processes. Where such assessment extends beyond mere assessment of issues of federal jurisdiction, it may be constitutionally suspect and open to challenge. As the federal government has shown increased willingness in recent years to direct how resource development should occur within provinces (such as prohibiting new coal mining and phasing out coal-fired power generation, suggesting that

new oil sands projects may not be in the public interest, and setting aggressive emissions reductions plans that require elimination of all power generated from fossil fuels), this aspect of the majority's opinion could stymie Canada's current approach to directing the future of our country's economy.

Third, while the federal government's authority to impose federal minimum standards for carbon pricing was recently confirmed by the SCC in *References re Greenhouse Gas Pollution Pricing Act* (*GGPPA Reference*) the majority emphasized that the *GGPPA Reference* did not extend federal authority beyond such minimum pricing standards to include regulation of greenhouse gases more generally, or any other matters within a province that the *IAA* captures.

Fourth, the majority reasoned that the *IAA* undermines the autonomy of Indigenous peoples to make lawful arrangements with provincial authorities and proponents of intra-provincial projects based on what federal decision-makers consider to be in their best interests. This reasoning continues a trend found in cases such as *Ermineskin* and *AltaLink* that emphasizes the importance of self-determination, autonomy and economic reconciliation with respect to Indigenous communities and groups that are best positioned to make their own decisions and cost-benefit analyses of particular projects proceeding on their traditional territories.

Shortly after the Court issued its decision, Canada announced that it will appeal to the SCC, which it may do as of right. Therefore, the Court's decision will not be the last word on the constitutionality of the *IAA* and the scope of federal powers to regulate resource development in the interests of environmental protection.