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Supreme Court of Canada finds the federal Impact Assessment Act unconstitutional

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On October 13, 2023, the Supreme Court of Canada released its judgment finding Canada's *Impact Assessment Act*[1] (the Act) and the *Physical Activities Regulations*[2] made under the Act (the PA Regulations) (together, the IAA) unconstitutional in part.

As Canada's highest appeal court, the Supreme Court majority's judgment is the final judicial opinion on the IAA's constitutional validity, after the issue was initially referred to the Alberta Court of Appeal. By way of a 5–2 majority,[3] the Supreme Court opined that the portion of the IAA addressing the assessment of "designated projects" is outside the federal Parliament's competence and is thus unconstitutional.

This Osler Update discusses the legal and practical implications of the judgment for proponents of natural resource and infrastructure projects in Canada.[4]

Background: *Impact Assessment Act*

The IAA, enacted in 2019, is the latest iteration of Canada's federal environmental assessment regime. "Designated projects" under the IAA are subject to a statutory prohibition on any activities that may cause adverse "effects within federal jurisdiction", absent approval from the federal government.[5]

The IAA provides two mechanisms by which an activity becomes a "designated project", which are relevant to the Supreme Court's judgment:

- First, the PA Regulations prescribe a list of physical activities automatically subject to the Act (the Project List). The Project List includes certain mine projects (e.g., thermal coal), hydroelectric projects, oil sands facilities, and oil and gas extraction, processing and storage facilities, if they exceed prescribed production-based thresholds. Such projects may be wholly located within the borders of a province and, on that basis, primarily regulated by provincial authorities.
- Second, the Act permits the Minister of Environment and Climate Change Canada (Minister) to designate a physical activity that is not on the Project List if, in his or her opinion, either the activity may cause adverse affects within federal jurisdiction or there

are public concerns related to those effects that warrant the designation.[6]

The Impact Assessment Agency (Agency) then considers whether the designated project requires an impact assessment and, if so, the project undergoes a lengthy federal review.

Ultimately, the Minister or the federal Cabinet has the power to decide whether a designated project proceeds based on federal priorities and legislated factors. These factors include, among many, "the extent to which the designated project contributes to sustainability", "the impact that the designated project may have on any Indigenous group", "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change" and "any other matter relevant to the impact assessment that the Agency requires to be taken into account".

From the proponent's perspective, designation under the IAA means delay, additional regulatory costs and uncertainty as to whether political decision-makers will permit a project to proceed based on the federal policy priorities of the day.

A separate component of the IAA deals with federal authorities' consideration of projects they carry out or finance on federal lands or outside Canada.

The reference and the Alberta Court of Appeal's opinion

In September 2019, the Alberta government asked the Alberta Court of Appeal to provide an advisory opinion on whether the IAA steps outside federal legislative authority. The Alberta Court of Appeal issued its advisory opinion [PDF] on May 10, 2022, with a majority of judges opining that the IAA is unconstitutional in its entirety. Our prior Osler Update discussed this decision and its implications: Alberta Court of Appeal finds federal impact assessment regime unconstitutional.

The Supreme Court of Canada's reasons

The Court unanimously agreed that the portion of the IAA addressing projects carried out or financed by federal authorities on federal lands or outside Canada is constitutionally valid and within federal legislative authority. However, the Court split 5–2 in its opinion on the IAA's scheme for "designated projects".

As discussed below, the majority held the "designated projects" component of the IAA to be unconstitutional, as exceeding federal legislative authority by regulating projects in their entirety (rather than limiting the assessment to areas of federal authority) and by defining effects within federal jurisdiction too broadly.

Conversely, a minority of the Court held that the IAA is constitutionally valid in its entirety.

The majority

Writing for a majority of the Supreme Court, Chief Justice Wagner[7] concluded that the designated projects scheme exceeds the bounds of federal jurisdiction for two main reasons.

First, the scheme is not directed at regulating "effects within federal jurisdiction". Instead, it requires the decision maker to consider a broad range of factors without specifying how

these factors must influence the decision. These broad factors govern the decision on whether a designated project requires impact assessment under the IAA, as well as the "public interest" decision which dictates whether and how an assessed project may proceed. According to the Court's majority, "[t]his shifts the dominant thrust of the decision away from the acceptability of adverse federal effects and directs it, instead, at the wisdom of proceeding with the project as a whole."[8] In this way, the scheme loses focus on regulating federal impacts and grants the decision maker "a practically untrammeled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety."[9] The majority said that this shift away from federal effect-based decision-making reaches beyond federal jurisdiction.

Second, the majority found that the IAA's definition of "effects within federal jurisdiction" is itself over-broad and goes "far beyond" the limits of federal jurisdiction in the Constitution. The Court's majority reasoned that, while Parliament can enact impact assessment legislation directed at the federal aspects of projects, its competence varies based on Parliament's jurisdiction to legislate in respect of the activity at issue. For example, Parliament has much broader authority to regulate interprovincial works and undertakings — such as cross-border pipelines — than it does over mines and other projects located wholly within a province. Over the former, the federal Parliament has authority to regulate the full project, while in respect of the latter it is limited to regulating the environmental effects on areas of federal jurisdiction, such as fisheries.

The "designated projects" scheme does not comply with these restraints because it treats all "designated projects" the same way, regardless of whether federal Parliament has jurisdiction over those activities or not. The majority noted that many of the "designated projects" subject to the IAA are primarily regulated by the provincial legislatures' powers over local works and undertakings or natural resources, and that the federal government's regulation of such projects must be tailored to the aspects of the project that properly fall within exclusive federal jurisdiction.

In addition, the Court's majority found that overbreadth of what are to be considered "effects within federal jurisdiction" exacerbates the constitutional frailties that the majority identified in the IAA's decision-making processes because the definition of "effects within federal jurisdiction" is central to the decision-making process. For example, the broad scope of "effects within federal jurisdiction" under the IAA allows the federal government to deny projects solely based on their greenhouse gas emissions. The majority held that this view of "effects within federal jurisdiction" goes beyond the national concern branch of the peace, order and good government power identified by the Supreme Court in its *References re Greenhouse Gas Pollution Pricing Act (GGPPA Reference)* decision, and would erode the balance inherent in the Canadian federal state.

Significant implications of the majority's opinion for Canadians, government and industry are discussed below.

The dissenting opinion

Justices Karakatsanis and Jamal disagreed with the majority and found the IAA *intra vires* Parliament and constitutional in full. Justices Karakatsanis and Jamal characterized the pith and substance of the IAA as establishing an environmental assessment process that assesses the effects of major projects on issues within federal jurisdiction (i.e., federal lands, Indigenous peoples, fisheries, migratory birds and lands, air or waters outside Canada or in provinces other than where a project is located) and determines whether to impose restrictions to safeguard against significant adverse federal effects.

Based on that characterization, the dissent found that the decision-making powers under the IAA are properly characterized as falling within Parliament's legislative jurisdiction over fisheries, navigable waters, Indians and lands reserved for Indians, criminal law, international and interprovincial rivers and the national concern branch of the peace, order and good government power. Justices Karakatsanis and Jamal emphasized that the fact that the IAA could be unconstitutional in certain cases does not mean that the legislation is unconstitutional writ large, and particular instances of government action that exceed statutory authority, federal jurisdiction or both could be challenged on judicial review in future cases.

Impacts on Canadians, government and industry

The Supreme Court of Canada's judgment, which is the final judicial opinion on this matter, will fundamentally alter the scope of federal assessment and decision-making over the vast majority of major projects, such as critical minerals mines, upstream oil production (including oil sands) and pipelines located wholly within a province. Parliament must now consider significant amendments to the IAA to address the Court's reasoning.

There are several key takeaways from the decision that will affect future environmental and impact assessment legislation and regulatory and judicial interpretation and application of that legislation to particular projects.

First, the majority confirmed that federal decision-making as to whether an assessment is required and whether a project located wholly within a province may proceed must consider only factors within federal legislative jurisdiction. For example, a narrow federal jurisdiction to assess the impacts of an oil sands project on fish and fish habitat cannot be used to assess a project as a whole and determine whether it is in the public interest based on policies and preferences of the federal government of the day.

Therefore, any amended version of the IAA must be laser focused on federal jurisdiction and effects within federal jurisdiction rather than broad policy-based considerations insufficiently tied to heads of federal power.

Second, although the Court did not focus on the lack of a materiality threshold for designation, which was a major focus of the Court of Appeal's decision, it continued to emphasize that, in light of the practical implications of project designation, the IAA triggers federal decision-making over projects that are not sufficiently tied to federal jurisdiction. As we mentioned in our prior Osler Update, this may have implications beyond this reference opinion with respect to other federal decision-making powers. The Court specifically held that the current legislation allows for a project's overall adverse effects — such as hindering sustainability broadly or Canada's climate change commitments — to substantiate a negative public interest decision, thereby losing its focus on regulating federal impacts and granting the decision maker "a practically untrammelled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety."[10]

Third, the Court's judgment also very much puts in question the federal government's recent plans for a cap on oil and gas emissions and a clean electricity standard, whose constitutionality has been challenged for intrusion on provincial jurisdiction (as discussed in our prior blog post). The majority noted in its reasons that the *GGPPA Reference* was limited to carbon pricing of greenhouse gas emissions, "a narrow and specific regulatory mechanism" (as discussed in our prior Osler Update).

The Court specifically noted that the national concern recognized by the Court in the *GGPPA*

Reference does not extend to enabling the federal government to comprehensively regulate greenhouse gas emissions, and therefore the inclusion of such sweeping regulatory powers in impact assessment legislation is impermissible. These statements suggest that other federal initiatives that specifically target greenhouse gas emission reductions, such as a cap on oil and gas emissions and a clean electricity standard, may similarly exceed the federal government's jurisdiction and erode the division of powers under the Constitution.

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[1] SC 2019, c. 28, s. 1 (the Act).

[2] SOR/2019-285 (the PA Regulations).

[3] Justices Brown and O'Bonsawin did not preside as a members of the panel.

[4] Osler, Hoskin & Harcourt represented the Business Council of Alberta in this proceeding. The Osler team was comprised of Maureen Killoran, KC, Sean Sutherland and Brodie Noga.

[5] *Act,* s. 7.

[6] *Act,* s. 9.

[7] Para. 134.

[8] Para. 174.

[9] Para. 178.

[10] Para. 178.