JURISDICTIONAL BATTLE OVER THE ENVIRONMENT CONTINUES – CANADA'S IMPACT ASSESSMENT LEGISLATION FOUND UNCONSTITUTIONAL

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Introduction

On May 10, 2022, the Alberta Court of Appeal in *Reference re. Impact Assessment Act*[1] ruled that the federal *Impact Assessment Act* (the "***IAA***")[2] and the related *Physical Activities Regulations*, SOR/2019-285, (the "***Regulations***")[3] are unconstitutional.

The *IAA* and the *Regulations* came into force in August 2019, replacing the *Canadian Environmental Assessment Act, 2012*.[4] In September 2019, the government of Alberta sought the Alberta Court of Appeal's opinion on the constitutionality of the *IAA* and the *Regulations*. Saskatchewan and Ontario supported the Government of Alberta in this endeavour. A number of other parties intervened on both sides of the issue.

By a majority of four to one the Court did not mince words; it found the *IAA* and the *Regulations* to be a significant overreach by Canada into areas of provincial jurisdiction that "would permanently alter the [federal-provincial] division of powers and forever place provincial governments in an economic chokehold controlled by the federal government."

While the *IAA* still remains in effect, the federal government has indicated it will be appealing the Alberta Court's decision to the Supreme Court of Canada.[5]

Federal Legislation At Issue

The federal government introduced the *IAA* in February 2018 as part of an effort to create a national environmental impact assessment regime. The *IAA* set out a legislative scheme for the assessment of environmental, social, economic, cultural and heritage impacts of "designated projects" carried out in Canada or on federal lands. The *IAA* deemed a range of activities as designated projects such as the construction, operation, decommissioning, or abandonment of certain infrastructure, mines, energy projects or facilities, and including intra-provincial activities that the federal government would decide to oversee if the project "may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns

related to those effects warrant the designation".

The *IAA* and *Regulations* together made up a complex piece of federal environmental legislation establishing when and how a project will be subject to a federal environmental impact assessment. More contentiously, they also established federal oversight and ultimate federal approval of intra-provincial activities that would otherwise be within provincial jurisdiction based largely on their environmental effects. The *IAA* included a mechanism by which the federal Minister may designate activities which are prohibited from proceeding if they "cause effects within federal jurisdiction." This prohibition will apply unless the federal Impact Assessment Agency determines that the project does not require an impact assessment or the project proponent has undertaken an impact assessment for the activity and successfully met all conditions imposed by the assessment decision and the agency allows it to proceed.

Federal Overreach and Threat to Provincial Powers

The Alberta Court found that the *IAA* and the *Regulations* were a significant federal overreach into provincial affairs that went well beyond the limits of power granted to the federal government under the *Constitution Act, 1867* (the "***Constitution***").

The Court applied a two-stage analysis to determine if the legislation was constitutionally valid. Under this analysis, the Court is first required to identify the dominant characteristics of the challenged law and, second, to determine whether those characteristics are within federal or provincial jurisdiction. The Court determined that the *IAA*'s dominant characteristic is "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". In determining the jurisdictional question, four out of five members of the Court concluded that the *IAA* "constitutes a profound invasion into provincial legislative jurisdiction and provincial proprietary rights" which, if upheld, would extend the scope of the federal government's powers to matters designated to the provinces under the *Constitution*.

The Court emphasized that the legislation would allow the federal government to regulate and effectively veto critical aspects of the province's economy. In its view, the IAA would undermine the division of powers in the *Constitution*, specifically overriding provincially-designated powers for management of public lands (s. 92(5)), local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), and local or private matters (s. 92(16)). More importantly, the IAA would also have the effect of removing the province's constitutional rights to ownership, development and management of its own natural resources (under s. 109 and s. 92(A)(1)).

The "environment" has not been assigned to either Parliament or the provinces under Canada's *Constitution*. The Court explained that activities should only be subject to federal environmental oversight if they are connected in some way to a federal head of power. Canada asserted that the basis for the federal

government's overreach in the *IAA* was designated activities having "effects within federal jurisdiction". However, the Court held that Parliament's broad definition of these effects included provincial projects that were not within federal jurisdiction. Although the main target of the legislation was intended to be fossil fuel and greenhouse gas ("**GHG**") generating projects, the *IAA* would also apply to intra-provincial highways, light rail transit systems, flood control, wind farms, solar farms, and many other intra-provincial infrastructure.

The Court emphasized that federalism is fundamental to Canada's existence and that a key part of Canada's federalism is the "preservation of the carefully calibrated division of powers between the federal and provincial governments". The *IAA* and the *Regulations* were found to undermine this division of powers by attempting to regulate matters within both provincial and federal competence. The Court thus found that such encroachments into provincial jurisdiction rendered the entirety of the *IAA* and the *Regulations* beyond Parliament's power to enact and therefore invalid.

Dissenting Opinion

In contrast, the dissenting opinion found that the *IAA* and the *Regulations* were a "valid exercise of Parliament's authority to legislate on the matter of the environment." Certain projects in areas with fish habitats or Indigenous peoples may have impacts on areas of both federal and provincial jurisdiction. Oversight of such impacts cannot fall upon one level of government alone as environmental concerns naturally "engage the interests of a complex matrix of jurisdictions." The dissent concluded that, although the *IAA* and the *Regulations* applied to intra-provincial projects, they were limited to those that may have adverse environmental effects in federal jurisdiction and were therefore constitutional.

Implications

As the Alberta Court declined to sever the problematic provisions of the *IAA* and the *Regulations* and since this is only an advisory opinion, the IAA remains unchanged and in effect. However, the scope of decision-making power of the federal Impact Assessment Agency over matters of intra-provincial concern may now narrow as the soundness of the exercise of federal jurisdiction over certain projects or activities is now in question.

The Court's decision has important implications for the regulation of GHGs in Canada. The Supreme Court of Canada had previously determined that the breadth of the federal doctrine of "national concern" in the area of GHG emissions was not to expand further than carbon pricing.[6] Taking its cue from this finding, the Alberta Court emphasized that GHG emissions and intra-provincial projects generating emissions were outside the scope of Parliament's jurisdiction even if the established intent under the *IAA* was to target GHG emitting projects.

Another problem with the *IAA* according to the Court was that it prevented Indigenous peoples from entering

into their own arrangements with project proponents and provincial authorities, instead focusing on what federal decision-makers consider to be in their best interests, contrary to the efforts being made towards Indigenous economic reconciliation and self-determination.

Although the Court noted that the *IAA* regime could lead to investor uncertainty, the Court's decision itself may also cause investor uncertainty as proponents face competing federal and provincial guidance until the issue is finally settled at the Supreme Court. The decision of the Supreme Court on appeal will be legally binding and may result in alterations or amendments to the *IAA* and the *Regulations*. The federal government in any case may wait until the appeal process is complete before considering changes to the legislation.

We will continue to monitor the progress of the appeal to the Supreme Court and update this Bulletin as necessary.

For more information on the *IAA* process and the implications of the Court's Decision on your project or proposed project, please contact any member of our team.

[1] *Reference re. Impact Assessment Act*, 2022 ABCA 165.
[2] *Impact Assessment Act*, SC 2019, c 28.
[3] *Physical Activities Regulations*, SOR/2019-285.
[4] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.
[5] CBC, *Alberta Appeal Court says federal environmental impact law violates constitution* (10 May 2022).
[6] Gordner, Loney, et al, Supreme Court of Canada Upholds Federal Carbon Pricing Regime (29 March 2021).

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A Cautionary Note