SCC REFERENCE RE IMPACT ASSESSMENT ACT: A STEP IN THE RIGHT DIRECTION FOR THE MINING INDUSTRY

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Introduction

On October 13, 2023, the Supreme Court of Canada (the “SCC”) released its long-awaited decision related to the constitutionality of Canada’s Impact Assessment Act (the “IAA”) and its Physical Activities Regulations (the “Regulations”). The IAA replaced the previous federal environmental assessment process, the Canadian Environmental Assessment Act, 2012, in 2019. It now serves as the legislation that sets out the process by which the federal government assesses the environmental and indigenous impacts of major projects, such as those in the natural resources and mining sector. These projects are heavily impacted by government reviews and assessments under the IAA and under several other statutes, and often at both the provincial and federal levels.

The SCC ruled that certain core provisions of the IAA and its Regulations were unconstitutional as they exceeded the jurisdiction of Parliament to enact. However, the Court found no fault with the IAA process itself, as well as with its application to projects conducted or funded by federal authorities on federal lands or outside Canada.

More specifically, the IAA grants the Minister of the Environment and Climate Change Canada (the “Minister”) authority to designate certain undertakings as “Designated Projects” subject to the IAA if they may cause adverse environmental, health, social, and economic effects within areas of federal jurisdiction.[1] The Court’s principal concern was that the IAA attempted to exert authority over projects in their entirety, thereby engaging areas under provincial jurisdiction, rather than restricting the federal assessment to only those areas under federal jurisdiction.[2] For a more extensive analysis of the court’s decision please see: Supreme Court of Canada Rules Impact Assessment Act Unconstitutional: Implications and Future Directions.

Provincial Responses and the Road Ahead

Predictably, various provinces have characterized the SCC’s decision as a significant win in the perennial tug-of-war over natural resources and environmental regulation between the federal government on one hand and provincial governments on the other.
Ontario’s Attorney-General almost immediately announced Ontario’s intention to challenge in court the IAA as it stands now on the basis that it is unfair to have an unconstitutional law obstruct much-needed infrastructure projects in a rapidly growing province. Ontario has filed two applications for judicial review in relation to the construction of Highway 413 and the construction of an underground parking garage at Ontario Place, both currently undergoing federal impact assessment. This approach seems premature and misguided given that the amendments to the IAA, which the federal government has committed to bring about, are likely to prompt the court to defer the hearing of Ontario’s application. It is also quite possible that the federal amendments could be in effect by the time that Ontario’s court applications are heard.

On the other hand, Ontario makes a very valid point when it states that the SCC’s ruling validates its longstanding argument that the federal impact assessment process duplicates the province’s already rigorous and globally recognized environmental impact assessment standards. The SCC’s decision gives rise to the hope that any revised IAA will, by necessity, enhance the harmony between the federal process and the provincial ones, a development that would be welcomed by the industry.

Not surprisingly, Alberta Premier Danielle Smith, a prominent figure in the provincial opposition to federal policies, saw the SCC decision as a significant victory for the safeguarding of provincial rights taking the opportunity to encourage companies to resume construction of natural gas plants. Premier Smith went further, declaring that the SCC decision effectively cancelled Ottawa’s ability to impose net-zero emissions on the electricity sector and predicting that the forthcoming federal cap on oil & gas emissions will also be rendered invalid.

In Saskatchewan, Premier Scott Moe and Justice Minister and Attorney General Bronwyn Eyre both expressed their support for the SCC decision which they said emphasizes the importance of the provinces’ rights and jurisdiction over natural resources, the environment, and power generation. They also expressed the hope that the ruling will prompt the federal government to reconsider its involvement in electrical generation and oil and gas production, suggesting that these areas have seen federal overreach.

**Implications for Mining**

Since the review of the IAA was a reference question sent to the SCC on appeal from an earlier reference to the Alberta Court of Appeal, the decision did not immediately invalidate the legislation. Parliament has been given the opportunity to redesign those portions of the IAA that the court ruled unconstitutional, and the federal government immediately announced its intention to do so. For proponents of projects currently undergoing federal impact assessments, the first takeaway is that those assessments continue.

In the wake of the decision, the federal government on October 26, 2023, issued interim guidance indicating that the Impact Assessment Agency of Canada (the “Agency”) will continue to advance ongoing impact
assessments with emphasis on the prevention and mitigation of adverse effects in areas under federal jurisdiction while the government amends the legislation to bring it into line with the court’s ruling. There are approximately 20 mining projects currently undergoing federal impact assessment, with others moving towards commencing the process. For projects that have been designated and are under review, the federal government has tasked the Agency with reviewing them and providing its view as to whether the impacts under assessment fall clearly under federal jurisdiction, applying the SCC’s analysis, and communicating with project proponents accordingly.

The second takeaway is that until the amended legislation is in force, the federal government will not make any new decisions designating projects for the purpose of the IAA. In the meantime, proponents of projects that are primarily provincial, such as mines currently undergoing federal impact assessment, may seize the opportunity to challenge and bring that process to an end by arguing that the federal process is legally suspect while the provincial process is sufficient (as well as lawful). Alternatively, proponents who have had their projects designated may seek to limit the scope of the assessment, considering the new legal standard set by the SCC. This is especially relevant if the Agency does not adhere to the standard, or if it does so in a manner deemed inadequate by the proponent.

Given the federal government’s commitment to bringing the IAA in line with the court’s guidance, it is evident that the federal government is not planning a complete overhaul of the IAA. Rather, it is looking to make targeted and precise adjustments to the specific elements of the legislation that failed to pass constitutional muster. Impact assessment of adverse effects on areas under federal jurisdiction, such as species at risk, fish and fish habitats, migratory birds, emissions and climate change, and indigenous rights, is what the revised IAA will need as a matter of law to focus on when a project is primarily provincially regulated. That said, it is important to note that the SCC was equally clear that the fact that a project may be mainly provincially regulated (as all non-renewable natural resources projects, including oil and gas, oil sands, hard rock mining, coal and other resource projects are, something the SCC again confirmed) does not mean that the province has exclusive legislative authority over it. In other words, and this is the third and last key takeaway, there is no such thing as a solely provincial undertaking when talking about protecting the environment.

More importantly for project proponents across the mining, energy and infrastructure industries, this exercise presents a golden opportunity for the federal government to reconstitute the federal impact assessments process in a way that addresses one of the main problems in this area which is the existence of duplicative and competing frameworks for impact assessment. If the revised IAA manages to better harmonize federal and provincial obligations in this important area in the true spirit of cooperative federalism it will more effectively serve the interests of all Canadians.

What will remain an open question for several years to come will be whether the SCC decision on the IAA will
ultimately work to thwart the federal government’s efforts to better regulate greenhouse gas emissions, by way of caps on different sectors for example, as part of Canada’s commitment to address the impacts of climate change.

What might a revised IAA look like? At the moment, we see two options that the federal government can choose from. The first would be to make explicit in the amended statute that “federal effects” are effects that are clearly and exclusively linked to areas under federal jurisdiction. The less palatable option would be to return to the mechanism under legislation before the IAA and adopt a trigger approach where the assessment is tied to federal decision-making. As the trigger approach as it existed under the old Canadian Environmental Assessment Act, for example, was problematic in both theory and practice from any number of points of view one hopes that the federal government will take what appears to be the simplest and most effective route to make the IAA constitutionally compliant, at the same time advancing the twin goals of streamlining the impact assessment process and reducing red tape and project uncertainty in general and as brought by the SCC decision and its aftermath.

[3] Wendy Cox and Mark Iype, “Western Canada: Ontario seeks to finish the job Alberta started by taking the federal impact assessment act to court” (October 25, 2023) at paras 1 and 7.
[9] Don Braid, “Smith is ecstatic as a horrible federal law finally get the trashing it deserves” (13 October 2023) at para 6.
[10] Don Braid, “Smith is ecstatic as a horrible federal law finally get the trashing it deserves” (13 October 2023) at paras 6-7.
Impact Assessment Act Reference Case” (13 October 2023) at para 3.
[16] John Woodside, “Premiers declare victory over Supreme Court impact assessment ruling everyone else says, not so fast” (13 October 2023) at paras 21-22.

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A Cautionary Note

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