Alberta Court of Appeal Rules that Federal *Impact Assessment Act* is Unconstitutional

By Laura Duke and John Olynyk

On May 10, 2022, the Alberta Court of Appeal handed down its decision on the constitutionality of the federal *Impact Assessment Act* (the "*IAA*"). The decision, rendered pursuant to a reference to the Court by the Alberta government, held that the *IAA* and its associated *Physical Activities Regulations* (the "*Regulations*") are unconstitutional as they go beyond the law-making powers of Parliament under the *Constitution Act, 1867*.

THE *IAA* AND *REGULATIONS*

The *IAA* was enacted by the federal government in 2019, as part of a suite of legislation aimed at revamping federal environmental laws. The federal Cabinet subsequently enacted the *Regulations*. The *Regulations* set out categories of projects and specific thresholds for those projects that would be reviewable under the *IAA*'s assessment processes.

Included within the list of projects that would be reviewable federally are categories of projects that are located within a province and not clearly within federal regulatory jurisdiction. Those designated projects include mines and metal mills; renewable energy projects; hazardous waste projects; and oil, gas and other fossil fuel projects, including new *in situ* oil sands projects over a certain production threshold. The decision refers to these types of projects as "intra-provincial projects."

THE MAJORITY DECISION

Background

The decision of the majority of the Court, written by Chief Justice Fraser, Justice Watson and Justice McDonald, and concurred in by Justice Strekaf, concluded that the *IAA* and the *Regulations* were unconstitutional and an overreach by the federal government. The majority provided a lengthy review of the history of the *Constitution Act, 1867* and key provisions added by the *Constitution Act, 1982*, including, in particular, section 92A of the *Constitution Act, 1867*, also known as the "Resource Amendment."

Section 92A confirms (among other things) exclusive provincial jurisdiction in the areas of: (i) exploration for non-renewable natural resources; (ii) the development, conservation and management of non-renewable resources and forestry resources; and (iii) the development, conservation and management of sites and facilities for the generation and production of electrical energy.

The majority stressed that section 92A was a "clear, deliberate negotiated amendment to the Constitution intended to assure exclusive provincial jurisdiction over the *exploration, development, management and conservation* of a province's 92A natural resources" and that it was "not a gift from the federal government to the provinces; it was a negotiated compromise" and that the provinces understood this added to their jurisdiction.

The majority of the Court then went on to provide a historical overview of the development of environmental impact assessment federally and the interpretation of those enactments by the Supreme Court of Canada, beginning with the 1984 *Guidelines Order* issued under the federal *Department of Environment Act*, to the 1992 *Canadian Environmental Assessment Act* ("*CEAA 1992*"), followed by the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*"). The majority noted the evolution of the process that would trigger a federal environmental assessment from a "decisions based" or "triggers based" process to a "project-based" process. Under the *Guidelines Order* and *CEAA 1992*, only those projects that fell into four main categories of federal decisions were subject to an environmental assessment, all clearly within federal jurisdiction. With the enactment of *CEAA 2012*, this moved to a "project-based" regime – categories and thresholds of reviewable projects were listed by regulation, or a project could be designated by the Federal Minister of Environment as reviewable.

The majority observed that under the *IAA* proponents of intra-provincial projects that are subject to assessment under the *IAA* may not proceed with their projects unless and until the federal executive determines that the project is in the public interest, the proponent cannot proceed with it.

THE DIVISION OF POWERS ANALYSIS

The majority then turned to its division of powers analysis, beginning with an analysis of certain constitutional principles including federalism and subsidiarity, the latter being the principle that law-making and its implementation are often best achieved at the effective level of government closest to the citizens affected. The majority noted that the jurisprudence has long confirmed that the federal government's head of power under section 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") does not establish a federal "enclave" from which provincial laws are excluded. Further, s. 35 of the *Constitution Act, 1982*, is not a source of jurisdiction, but instead, quoting the Supreme Court of Canada in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, its purpose is to "facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty."

The majority then turned to the division of powers analysis which involves a two-step process:

1. The "subject matter" of the impugned law is characterized, by identifying its "dominant purpose" or its "pith and substance"; and

2. The challenged legislation is then "classified" or "characterized" under a head of power (in the case of the *IAA* and *Regulations,* a federal head of power).

Subject Matter

In determining the true subject matter of the *IAA*, the majority considered the purpose of the *IAA* legislative scheme, and its effects – both legal and practical. The majority concluded that the purpose of the *IAA* is to:

> "establish a federal impact assessment and regulatory regime to review and regulate *all effects* of both federal designated projects and intra-provincial projects even though intra-provincial designated projects otherwise fall within exclusive provincial

> jurisdiction and even though all effects of intra-provincial designated projects, including GHG emissions therefrom, are not within federal heads of power."

The majority then considered the legal and practical effects of the *IAA*. The majority found that the *IAA* would require federal review of the "effects" of intra-provincial designated projects even where the federal government has no decision-making authority with respect to an intra-provincial designated project under other valid federal legislation.

It held that the federal executive has been empowered to designate, and has designated, whatever intra-provincial activities it unilaterally decides to include on the project list, despite not having a federal decision-making authority linked to a federal head of power for those projects. In addition, it held that the *IAA* imposes a regulatory regime that requires assessment of *all effects* of those projects, and not those limited to matters actually within federal jurisdiction.

In short, the legislative scheme both captured certain types of projects that are intra-provincial and are not linked to a federal head of power, but also required that the assessment undertaken for those projects examine *all* effects of the project, whether or not they were linked to federal jurisdiction. The court found that this was an overreach of federal jurisdiction and demonstrated that the "true purpose of the *IAA* is not to prevent adverse environmental effects on matters actually within federal jurisdiction but rather to regulate intra-provincial designated projects and veto those which the federal executive does not consider to be in the public interest – based on federal priorities and policies."

The majority also noted that the federal government has not concealed its purpose in designating intra-provincial projects, and that its target was the regulation of greenhouse gas ("GHG") emissions. The majority reasoned that where a proposed intra-provincial project in a province would emit any GHG emissions – which would necessarily include every proposed intra-provincial project in every province – the federal executive would have the right to decide whether that project would proceed. The majority held that this was Parliament's way of seeking a power to regulate GHG emissions in a province, a right which it does not have the jurisdiction to do under the Constitution.

The majority was of the view that the Supreme Court of Canada's decision in *References re Greenhouse Gas Pollution Pricing Act* did not establish that Parliament had the power to regulate GHG emissions generally. Instead, that decision established that the federal government could establish minimum national standards for GHG pricing stringency – but did not establish a power to regulate GHG generally.

Based on its analysis, the majority concluded that the subject matter of the *IAA* and *Regulations* – the "pith and substance" – 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". The majority held that this subject matter "intrudes fatally into provincial jurisdiction and the provinces' proprietary rights as owner of their public lands and resources."

Classification

Having determined the subject matter of the *IAA* and *Regulations*, the majority then turned to the next step in the analysis to determine whether the subject matter, as defined, fell within a federal head of power. The majority found that it did not.

The majority considered Canada's argument that there were three "triggers" within the legislation that brought a project reviewed under the *IAA* within a federal power. In particular, for designated intra-provincial projects two relevant triggers were said to be:

(1) a federal decision-based trigger, which arose out of the prohibition on a federal authority from exercising a power or performing a duty that could permit a designated project to be carried out under section 8 of the *IAA*; and

(2) an effects-based trigger, arising out of the prohibitions on the proponent from causing any changes to identified matters under section 7 of the *IAA*.

The majority disagreed and found that the federal jurisdictional overreach applied equally to the projects subject to section 8 (prohibiting a federal authority from issuing a permit unless a decision is made with respect to the assessment under the *IAA*) and to intra-provincial projects that do not require a federal permit – as proponents of the latter were still subject to a prohibition from carrying out the project if there was a possibility they could cause certain effects within the legislative authority of Parliament.

The majority then went through other federal heads of power – sea coast and inland fisheries (s. 91(12)), imperial treaties (s. 132), Indians and lands reserved for Indians (s. 91(24)), the national concern doctrine under the "Peace Order and Good Government" jurisdiction (s. 91), trade and commerce (s. 91(2)), and criminal law (s. 91(27)) and found that the *IAA* could not properly be classified under any of those federal heads of power.

Instead the majority found that the subject matter of the *IAA,* when applied to intra-provincial designated projects, fell within several provincial heads of power, namely development and management of natural resources (s. 92A), proprietary rights as owners of public lands (s. 109), 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)).

The majority of the Court concluded that if it were upheld "the *IAA* would reduce the plainly applicable provisions of s 92A, s 92(5), s 92(1), s 92(16) and s 109 to a subordinate status to federal authority. The unavoidable effect of the *IAA* would be the centralization of governance of Canada to the point this country would no longer be recognized as a real federation. This is not what the framers of our Constitution intended. And it is certainly not what provincial governments agreed to either on patriation of the Constitution."

It further stated: "Where natural resources are involved, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns those natural resources, not the federal government. And it is the province and its people who lose if those natural resources cannot be developed, not the federal government. The federal government does not have the constitutional right to veto an intra-provincial designated project based on its view of the public interest. Nor does the

federal government have the constitutional right to appropriate the birthright and economic future of the citizens of a province."

In sum, the majority found that the *IAA* and the *Regulations* to be unconstitutional.

THE DISSENT

As noted, Justice Greckol wrote a lengthy dissent, differing from the majority in her reasoning with respect to both the subject matter and the classification of the *IAA* and upholding the *IAA* and *Regulation* as constitutional and within Parliament's jurisdiction.

With respect to the subject matter, Justice Greckol characterized the legislation following Mr. Justice LaForest's description of environmental assessment in the Supreme Court of Canada's decision, *Oldman River Society v. Canada (Minister of Transport)* as a "planning tool that is now generally regarded as an integral component of sound decision-making…"

Justice Greckol concluded that the subject matter of the *IAA* and the *Regulations* is to "establish a federal environmental assessment regime that facilitates planning and information gathering with respect to specific projects to inform decision-making, cooperatively with other jurisdictions, as to whether the project should be authorized to proceed on the basis that identified adverse environmental effects purported to be within federal jurisdiction are in the public interest."

Turning then to classification of the legislation under a federal head of power, Justice Greckol agreed with the majority that "environmental regulation" was not a single matter or discrete head of power, and that legislative authority over environmental regulation is distributed amongst the various federal and provincial heads of power.

She then found that some of the matters in the *Regulations* project list were, on their face, within the federal jurisdiction, and others within provincial jurisdiction. For instance, physical activities or projects located within a National Park, federal protected wildlife area, bird sanctuary or protected marine area were within federal jurisdiction. By contrast, the examples of mines and metal mills and oil, gas and other fossil fuel facilities were *prima facie*, within provincial jurisdiction.

However, Justice Greckol found that certain provisions in the *IAA* limited the jurisdiction of the federal government. In particular, s. 7 of the *IAA* provided that the proponent of a project was prohibited from doing any act or thing in connection with the designated project, if that act or thing would cause any prescribed effects. The prescribed effects then listed were all within federal jurisdiction (fish and fish habitat, aquatic species under the federal *Species at Risk Act*, migratory birds, changes to the environment on federal lands, among others).

She held that "I find that each of these s 7 effects fall within a head of federal power under s 91 of the *Constitution Act, 1867*. In other words, the *IAA* regime applies specifically to *effects* that are changes to the environment within federal jurisdiction." She found that this held equally true for intra-provincial designated projects.

Justice Greckol also found that it was constitutionally permissible for the *IAA* to require assessment of all the effects of a designated project, and that while the assessment may take into account broad factors, the decision-making provisions requiring the Minister or

Governor-in-Council to make a public interest decision on whether to approve a project were also jurisdiction-limiting. She found that s. 22 factors to be assessed as part of the impact assessment were broader than the prescribed factors for decision-making under sections 60 and 62 of the *IAA*. Under those decision-making sections, the Minister or the Governor-in-Council were required to determine whether the adverse effects *within federal jurisdiction*, taking into account the public interest factors in s. 63, were in the public interest.

Justice Greckol held that Parliament had established a federal environmental assessment regime designed to regulate effects within federal jurisdiction caused by physical activities or designated projects, and that therefore the *IAA* and *Regulations* are constitutional.

IMPACT OF DECISION

As noted at the outset, the decision arose from a reference to the Alberta Court of Appeal by the Government of Alberta. Reference decisions are considered advisory only. As a result, while the majority has held the *IAA* and *Regulations* to be unconstitutional, the *IAA* and *Regulations* remain in full force and effect.

In addition, the Alberta Court of Appeal's decision is not the final word on the matter. On the same day that the decision was released, the Government of Canada announced it would appeal the decision to the Supreme Court of Canada.

We will await that decision. While it may provide clarity on the constitutionality of the *IAA*, we note that the federal government's goal in enacting this legislation – "to rebuild public trust in how decisions about resource development are made" clearly has not been achieved, and remains elusive.

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If you have any questions about the federal *Impact Assessment Act*, or any other related issue, please contact either Laura or John above, or another member of Lawson Lundell's Environmental & Regulatory Group.