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Natural Resources

Hypothetical scenarios, judicial review | Sara Blake

By **Sara Blake**

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(October 17, 2023, 12:24 PM EDT) -- When I reviewed the *Impact Assessment Act* some years ago, I wondered if it would survive constitutional challenge, given its potential for broad reach into matters within provincial constitutional jurisdiction. So, I am not surprised that the majority of the Supreme Court of Canada ruled that part of it is unconstitutional: *Reference re Impact Assessment Act,* 2023 SCC 23.

The administrative law issue that interests me is the point on which the majority and dissent disagreed. It concerns the adequacy of judicial review of individual decisions as a method of addressing a statute's potential for constitutional overreach.

Both federal and provincial governments have constitutional authority over environmental issues. The *Impact Assessment Act* overlaps provincial environmental assessment laws in that some projects are potentially subject to both. The court unanimously confirmed that different aspects of a project may be regulated by each level of government within its constitutional jurisdiction. The federal government has constitutional authority over environmental harms to federal Crown lands, Indigenous rights, fish and migratory birds and harms that cross provincial and international borders. Each province has constitutional authority over environmental harms that occur within the province.

The court confirmed that the federal government does not have constitutional authority to assess the environmental impact of intra-provincial projects, except to the extent they impact matters within federal constitutional authority.

The court agreed that the constitutional issue was the risk of overreach; that is, the possibility that the *Impact Assessment Act*, as drafted, could be applied to prohibit projects within a province even though their environmental impact on matters within federal jurisdiction is limited to one effect of the project. They quibbled over how material the effect needs to be for the Act to be invoked. The majority was concerned about designation of a project that has insufficient impacts on areas of federal jurisdiction. The dissent noted the statutory use of the word "significant."

The court agreed that, in order to determine whether the federal government has constitutional authority over any aspect of a specific project, it may be necessary to gather and assess the facts. To do this, a project must first be designated for an impact assessment. The designation for impact assessment prohibits the project proponent from doing anything to carry out the designated project pending the outcome of the assessment. At the end of the process, the minister may lift the prohibition or leave it in place killing the project. The court agreed that the prohibition pending fact gathering is consistent with the precautionary principle.

As this case was decided on a reference as to the constitutionality of the statute, it was not a judicial review of a decision assessing any specific project.

The dissent was influenced by availability of judicial review of individual decisions made under the Act. The dissent ruled that the court's decision should be governed by the presumption that the Act will be applied constitutionally. A statute broadly written in general terms should be interpreted

consistently with the Constitution. The court should not find legislation unconstitutional simply because it could conceivably be misused. They ruled that judicial review of each decision, on an evidentiary record, is adequate protection against constitutional overreach.

The majority ruled that courts cannot rely on the presumption of constitutionality to disregard a statute that speaks clearly and is *ultra vires* its enacting body. They ruled that the Act is overly broad in that its language is not sufficiently anchored by "effects within federal jurisdiction" and expressed concern about the prohibition on taking any steps to carry out a project that has minimal effects on federal public interests, mentioning the delays and costs to proponents. And further that unconstitutional legislation cannot be saved by the prospect of judicial review quoting *R. v. Hydro-Québec* [1997] 3 S.C.R. 213.

> However, the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all.

The Hydro-Québec case was a federal prosecution respecting a specific incident — the accused had released a toxic substance into a river. The statutory authority for federal prosecution was upheld under the criminal law power, with mention that the incident was within federal jurisdiction to regulate navigable waters and fisheries. Though the quote is broad, it is obiter, given that the case concerned an environmental incident that occurred, rather than speculation as to what projects could potentially attract federal environmental regulation.

In contrast, in this Reference, the majority ruling is based on hypothetical scenarios — the dissent rejected that approach. I have always had concerns about the court's practice of deciding cases on the basis of hypothetical scenarios rather the actual events. I suppose a reference invites that approach. But the court has also done it in appeals, sometimes preferring a hypothetical over the facts of the case. They say they do it in order to draw the line between situations to which the statute applies and those that are outside the ambit of the statute. They grant leave to appeal in factually clear-cut cases in order to settle the law relating to hypothetical scenarios at the periphery of the statutory scheme. Historically, the common law would wait for the outlier case to arise before settling where the line is drawn. That case may never arise if those responsible for administering the statute stay well within its boundaries.

The dissent dismissed the hypothetical approach, ruling that any overreach could be addressed by judicial review of a decision on a specific project. The majority disagreed, ruling that constitutional validity of a statute should be determined at the outset before the statutory authority is exercised. Neither addresses the issue of prematurity, which concerns the judicial policy of dismissing applications for judicial review that are commenced prior to the release of the final decision on the merits. Applying this policy, an application for judicial review of the designation of a project would likely be dismissed as premature. It is well-established that neither constitutional issues, nor the delays and costs of continuing until a final decision, constitute extraordinary circumstances that would warrant judicial review at an early stage. If the dissent prevailed, the project proponent would have to go through the entire assessment process, which could take several years and considerable costs, until there is a decision of the minister. Then, if it is negative, the proponent could seek judicial review on constitutional grounds (assuming this constitutional issue was raised early in the process).

I have given thought to whether, by failing to address this issue, the majority invites premature judicial reviews on constitutional grounds. Now lower courts might be faced with arguments that, based on this decision, the prematurity policy no longer applies to constitutional grounds for judicial review. The courts should reject these arguments. This case concerns a direct constitutional challenge to the statute in the absence of an exercise of power under the statute. A constitutional ground for judicial review of an exercise of statutory power should continue to be subject to dismissal on the ground of prematurity except in extraordinary cases. In my experience, most constitutional grounds raised on judicial review lack merit and most cannot be decided until factual findings have been made by the tribunal.

Both the majority and dissent say that the statute is clearly drafted, but their interpretations were

significantly different. Neither the majority nor the dissent mentioned the word "ambiguity." If the statute were ambiguous, it had to be interpreted consistent with the constitutional authority of the federal government to enact it. On my read, the statute is not ambiguous. Rather, it is worded in general terms with the expectation that the extent of its reach will be determined on a case-by-case basis by the minister. Given that the reference was brought prior to any final decisions, its constitutionality was assessed on the basis of hypotheticals rather than real scenarios.

I have provided a cursory explanation of the constitutional and statutory interpretation issues so as to discuss the judicial review issue. Other commentators may focus their analyses on those issues.

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