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Supreme Court of Canada

SCC rules 2019 federal environmental impact assessment scheme largely ultra vires Parliament

By **Cristin Schmitz**

(October 13, 2023, 11:35 AM EDT) -- In a judgment that reins in what Alberta and many provinces see as federal overreach in the name of protecting the environment, the Supreme Court of Canada has ruled 5-2 that the regulatory regime under the federal Impact Assessment Act is largely *ultra vires* Parliament as its "designated projects" scheme exceeds the bounds of federal jurisdiction under the *Constitution Act, 1867.*

In a declaratory judgment Oct. 13 on the Alberta government's reference of two questions to the Alberta Court of Appeal, a majority of the Supreme Court of Canada affirmed, in part, last year's 4-1 Appeal Court decision which held that the IAA and its regulations were ultra vires Parliament in their entirety as improper "legislative creep," impinging on s. 92A of the *Constitution Act, 1867*, which gives provinces exclusive power to make laws related to the exploration, development and management of non-renewable and forestry resources within their boundaries: *Reference re Impact Assessment Act*, [2023] S.C.J. No. 23.

(Section 92A of the *Constitution Act, 1867* was added to the Constitution in 1982 at the insistence of the Saskatchewan and Alberta governments of the day.)

The Alberta Court of Appeal's majority judgment last year decried the IAA, which came into force in 2019, as having the unavoidable effect of centralizing Canada's governance "to the point this country would no longer be recognized as a real federation": *Reference re Impact Assessment Act,* 2022 ABCA 165.

Chief Justice Richard Wagner

The two questions the Alberta government posed in court were whether part 1 of the federal statute (Bill C-69) is ultra vires the Parliament of Canada, in whole or in part, and whether its *Physical Activities Regulations*, SOR/2019-285, are unconstitutional, in whole or in part, by virtue of purporting to apply to certain activities listed in schedule 2 of the regulations "that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada."

As described by the Supreme Court of Canada, the IAA and its regulations "establish a complex information-gathering and regulatory scheme, which is essentially two schemes in one."

First, a discrete portion, in ss. 81 to 91 of the IAA, deals with projects carried out or financed by federal authorities on federal lands or outside Canada.

All seven Supreme Court judges held that this discrete portion of the federal scheme is *intra vires* Parliament.

However, they went on to split 5-2 over the constitutionality of the remaining provisions of the IAA and regulations, which deal with what the federal law defines as "designated projects."

For the five-judge majority comprising also Justices Suzanne Côté, Malcolm Rowe, Sheilah Martin and Nicholas Kasirer, Supreme Court Chief Justice Richard Wagner concluded that part (i.e. most) of the federal scheme is ultra vires Parliament.

"Environmental protection remains one of today's most pressing challenges," the chief justice wrote. "To meet this challenge, Parliament has the power to enact a scheme of environmental assessment. Parliament also has the duty, however, to act within the enduring division of powers framework laid out in the Constitution."

First, "in pith and substance," the portion (ss. 81 to 91) of the IAA that directs the manner in which federal authorities assess the significant adverse environmental effects that projects carried out or financed by federal authorities on federal lands or outside Canada may have "is clearly *intra vires*" Parliament, the chief justice held.

Second, the pith and substance of the balance of the scheme — made up of the IAA's remaining provisions and the regulations dealing with "designated projects" – is to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts, he continued.

"In my view, Parliament has plainly overstepped its constitutional competence in enacting this designated projects scheme," Chief Justice Wagner concluded. "This scheme is *ultra vires* for two overarching reasons. First, it is not in pith and substance directed at regulating 'effects within federal jurisdiction' as defined in the IAA because these effects do not drive the scheme's decision-making functions. Second, I do not accept Canada's contention that the defined term 'effects within federal jurisdiction' aligns with federal legislative jurisdiction. The overbreadth of these effects exacerbates the constitutional frailties of the scheme's decision-making functions."

In their joint dissent, Justices Andromache Karakatsanis and Mahmud Jamal concluded that both the IAA and its regulations are "constitutional in their entirety."

"The subject matter of the IAA is anchored in several federal heads of legislative power under the *Constitution Act, 1867* in relation to fisheries and aquatic species (s. 91(12)), migratory birds (s. 132), "Indians, and Lands reserved for the Indians" (s. 91(24)), and interprovincial and international pollution (s. 91)," they wrote. "Particular instances of government action that may exceed statutory authority, federal jurisdiction, or both, can be challenged on judicial review in future cases with a well-developed evidentiary record, rather than through this reference. The fact that the IAA could conceivably be used unconstitutionally in some cases does not mean that the legislation is unconstitutional."

The respondent attorney general of Alberta had argued in its factum at the Supreme Court that "the IAA overreaches in terms of the projects and activities to which it applies, and the scope of the assessment it purports to require. The IAA gives a federal veto power over provincial project management and approvals, representing a threat, inter alia, to exclusive provincial jurisdiction over local works and undertakings, and resource ownership and development under section 92A of the *Constitution Act, 1867*, as well as other areas of provincial power. On the second question, Alberta submits that the Regulations designate projects and undertakings within exclusive provincial authority and, to the extent they purport to do so, are *ultra vires*."

The appellant attorney general of Canada argued in its factum that, contrary to the view of the majority of the Alberta Court of Appeal, the IAA and regulations "do not provide a federal veto over 'provincial projects'. Rather, the pith and substance of the IAA is to safeguard against adverse environmental effects in relation to matters within federal jurisdiction under the *Constitution Act, 1867.* The pith and substance of the regulations is to identify projects with the greatest potential for adverse federal effects for the purpose of determining whether an impact assessment is warranted. The IAA and regulations restrict federal assessments to projects that have effects in relation to federal subject matters. They do this by carving out projects, at a preliminary stage, from the requirement for a federal assessment where it is determined that there are no expected adverse federal effects. In addition, where a federal assessment does take place, federal conditions are limited to mitigating those federal effects."

The Supreme Court of Canada's judgment provides guidance on how to characterize laws when analyzing the Constitution's division of powers, including how to precisely identify the matter at issue, and how to classify it within a head of power in the Constitution.

The IAA regulatory process ruled ultra vires in the reference decision encompasses various "designated projects," such as coal and other power generating facilities, marine terminals and mining projects.

According to the federal government, there are currently 23 projects in the federal impact assessment process under the IAA, with eight final decisions having been issued by the minister or the Impact Assessment Agency of Canada which allowed those projects to move forward.

Within hours of the Supreme Court ruling that the heart of the IAA's regulatory scheme is ultra vires, the federal Liberal government announced "we will now take this back and work quickly to improve the legislation through Parliament."

"We accept the court's opinion, which provides new guidance on the *Impact Assessment Act*, while explicitly affirming the right of the government of Canada to put in place impact assessment legislation and collaborate with the provinces on environmental protection," Environment and Climate Change Minister Steven Guilbeault and Minister of Justice Arif Virani said in a joint statement.

"The Government of Canada developed the *Impact Assessment Act* to create a better set of rules that respect the environment, Indigenous rights and ensure projects get assessed in a timely way," they said. "We remain committed to these principles. We are heartened that the Supreme Court of Canada affirmed our role on these core principles."

The two federal ministers added "we will continue to build on 50 years of federal leadership in impact assessments. We respect the role of the Supreme Court in Canada's democracy and, as such, we will follow the guidance of the court and collaborate with the provinces and Indigenous groups to ensure an impact assessment process that works for all Canadians."

"Our immediate priority will be to provide guidance to our many stakeholders and Indigenous partners to ensure as much predictability as possible for projects affected by this opinion," Guilbeault and Virani said. "We understand the importance of timeliness in determining a path forward. The government of Canada wants to ensure clarity and certainty for investment in the projects this country needs. We are committed to address this promptly and continue to make Canada an attractive and predictable place to invest in good, sustainable projects as we create and protect middle class jobs and advance on the path of reconciliation."

In a separate joint statement from Alberta's United Conservative government, Alberta Premier Danielle Smith and Alberta Justice Minister Mickey Amery said "we are very pleased with the Supreme Court's decision confirming the unconstitutionality of the federal government's destructive Bill C-69 legislation. This legislation is already responsible for the loss of tens of billions in investment, as well as thousands of jobs across many provinces and economic sectors. The ruling today represents an opportunity for all provinces to stop that bleeding and begin the process of reattracting those investments and jobs into our economies."

Alberta's premier and justice minister described the ruling as "a massive win for the protection of sovereign provincial rights under the Constitution."

"The federal government, through passage of Bill C-69, and continuing now with their proposed electricity regulations and oil and gas emissions cap, is blatantly attempting to erode and emasculate the rights and authorities of provinces as an equal order of government under the Canadian Constitution," they said. "Today's court decision significantly strengthens our province's legal position as we work to protect Albertans from federal intrusion into various areas of sovereign provincial jurisdiction. Alberta will continue to partner with other willing provinces and interveners in pushing back against these unconstitutional federal efforts using all legal means available to us."

Smith and Amery called on the federal government "to learn the lessons from this decision and abandon their ongoing unconstitutional efforts to seize regulatory control over the electricity and natural resource sectors of all provinces. Instead, we invite them once more to come to the table in good faith and work with Alberta to align our mutual efforts on emissions reductions and development of our electricity grid and world-class energy sector. In this regard, we hope today's decision provides an opportunity for a reset in the ongoing provincial-federal discussions on these issues."

Peter Gall, Gall Legge Grant Zwack LLP

Peter Gall of Vancouver's Gall Legge Grant Zwack LLP, counsel for the intervener Independent Contractors and Businesses Association and Alberta Enterprise Group, said he sees "no reason" for the federal government to legislate.

"Currently they have all the tools they need to protect birds and fisheries and other things within federal jurisdiction," he said. "There was absolutely no need for this legislation, other than they wanted to take over the whole assessment project and intrude on provincial jurisdiction."

Gall told Law360 Canada his clients, representing major businesses in Alberta, are "ecstatic" about the court's decision. "These are people who are out there building projects, working on projects, and are in support of economic development," he said, noting his clients saw the law "as a big impediment to economic development."

The Supreme Court's ruling "hopefully will encourage more economic development in Canada, and certainly in Alberta, because the companies are not going to be faced with these two levels — a redundant level — of assessment."

Gall, who was also counsel for the Alberta government in a constitutional challenge to the federal carbon pricing legislation upheld by the Supreme Court in 2021, said the ruling declaring most of the IAA unconstitutional is "a welcome sign" to Alberta and such provinces as Saskatchewan (which this year enacted "Saskatchewan First" legislation declaring provincial sovereignty over natural resource development), who have been resisting what they see as clearly unconstitutional federal overreach in the area of environmental protection.

"I think co-operative federalism really depends upon respect for the jurisdiction of each level of government, and if one government comes along with a big stick, and says, 'we can control

everything,' there isn't going to be much co-operation, is there?" Gall observed. "That's exactly what, unfortunately, we've been seeing ... some of the provinces, at least, are very anxious about the provincial role in our federal system and ... talking very strongly about having to protect that role. Now they see that the Supreme Court of Canada will draw lines and ... will respect the initial division of powers in our Constitution."

Gall said he was "pleasantly surprised" by the Supreme Court of Canada's decision, one which some court watchers had predicted would come down in favour of Ottawa, based on the top court's past rulings.

"They thought the Supreme Court of Canada was on this mission to increase the scope of federal power beyond what was intended in our Constitution — that's what people thought, wrongly," said Gall. "And that's the message [of this decision], that the Supreme Court has said: 'No, we're going to respect the existing boundaries' " in the Constitution.

Gall said the court's carbon "tax" decision two years ago was part of a trend on the top court to increase the scope of federal jurisdiction, particularly in environmental matters. "I thought, from a legal perspective, that clearly was an expansion of the peace order and good government [POGG] clause, the residual powers of the court, beyond anything that could be supported in previous jurisprudence."

He confessed, therefore, "I was holding my breath with this one because I feared the court would continue on that path. So I was pleasantly surprised and, in my view, this is absolutely the correct result legally, and practically ... because ... it's not that anybody's against environmental assessment — but two layers of assessment [provincial and federal], that's a project killer ... that's a big, big, big deterrent. So from a practical perspective and economic-development perspective, this is just welcome news for our clients."

Gall said businesses, particularly in Alberta, saw the federal law not only as killing economic development, but also as constitutionally flawed because Ottawa is "hiding behind fisheries and migratory birds to take over provincial jurisdiction over provincial projects. It was just a thinly veiled attempt to intrude on provincial jurisdiction, to increase the scope of federal involvement on provincial jurisdiction. And I'm so pleased that the Supreme Court of Canada saw through it," he said. "The Alberta court certainly saw through it."

Gall said he doesn't think the court's ruling leaves a gap in environmental protection that needs to be filled by revised federal environmental regulation. "I think the view that only the federal government is the ally of the environment is completely wrong-headed," he remarked. "This decision of the Supreme Court of Canada doesn't in any way negatively affect protection for the environment. It just says that with respect to provincial projects, it is the provinces that have the primary role in protecting the environment — and that's what they're doing."

At bottom, the decision sends a message that the federal government cannot use its limited environmental jurisdiction over things like migratory birds and fisheries "as a tool or device to take over regulation, generally, of a provincial project, which is what this Act did," he said.

Environmental and Indigenous groups were among 29 intervener entities or coalitions in Ottawa's appeal to the Supreme Court, including the attorneys general of British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick and Newfoundland and Labrador, as well as industry groups and other advocates.

Tim Dickson, JFK Law Corporation

Tim Dickson of Vancouver's JFK Law Corporation, who with Mae Price represented the Mikisew Cree First Nation, told Law360 Canada "there is no doubt that Parliament will now need to rewrite this legislation."

"It is clear from the majority judgment that Parliament has substantial jurisdiction to regulate the environmental effects of projects that are not on federal lands and are not otherwise 'federal projects', but it must do so more narrowly, in a manner more precisely focused on effects within federal jurisdiction," he said.

Dickson noted that the legislative process leading to the *Impact Assessment Act* was lengthy and included substantial consultation with industry, environmental groups and Indigenous nations. "There is relatively little time available ahead of the next federal election [slated for 2025], and the government may seek to move more quickly to bring in a replacement regime before the writ drops," he suggested.

Dickson noted a number of Indigenous nations intervened in the reference, with most supporting the federal regime's constitutionality. "Mikisew Cree First Nation did so because it has long witnessed the weakness of Alberta's environmental assessment regime, particularly in respect of impacts on Indigenous peoples," he said. "The federal legislation has long been viewed as an important layer of protection for Indigenous nations, as well as for critical components of the environment."

Dickson said the ruling means that "provinces will have greater practical power to ensure that projects with large environmental effects can proceed. ... Most provincial governments ... and industry groups will likely welcome that result, but for Indigenous groups like Mikisew Cree First Nation – who have witnessed their territories transformed by industrial development, particularly in the oil sands – the judgment is highly concerning, as it removes some of the existing protection for their rights and for the environment on which they depend."

He said the top court's majority and minority judgments both acknowledge that the environment is not in itself a constitutional head of power and that management of environmental effects cuts across many different areas of constitutional responsibility. "Both the majority and minority also agree that Parliament has substantial jurisdiction to regulate environmental effects, and that shared federal and provincial responsibility for environmental assessment is workable and a central feature of environmental decision-making in Canada."

Joshua Ginsberg, counsel for the intervener Ecojustice, said the environmental advocacy group is disappointed by the ruling, but stressed "there remains a need for strong environmental assessments that work for everyone."

"Even though the court found the IAA was not sufficiently focused on federal jurisdiction, it confirmed that no project is immune from environmental scrutiny," Ginsberg said in a statement. "All types of projects can and should be subject to a comprehensive federal environmental assessment to protect against harm in Canada's areas of responsibility."

He added "all governments, including federal and provincial, have a responsibility to take action to

fight climate change, the massive loss of biodiversity, and dangerous pollution impacting communities. ... The provinces must step up and also do their part when it comes to environmental assessments of extractive and environmentally damaging projects."

Interveners Nature Canada & West Coast Environmental Law, issued a statement asserting that "the constitutional issues identified by the court can be addressed by a handful of amendments to the *Impact Assessment Act*."

"The challenge for the federal government is to work with the provinces, Indigenous nations and consult with the public to ensure that the revised law aligns with the court's decision," said Stephen Hazell, Nature Canada's emeritus counsel.

"The court has confirmed the federal government's critical role in ensuring a safe and healthy environment for Canadians," he said. "This is a far cry from the position of the government of Alberta."

Anna Johnston, a staff lawyer with West Coast Environmental Law, added that the majority and minority opinions "agreed with our arguments about when the federal government can require an assessment and the information that can be considered. Overall we think this opinion can be a win for Canadians and the environment, but Parliament needs to step up and enact amended assessment legislation that applies to all projects with the potential to harm areas of federal jurisdiction."

Elizabeth May, co-leader of the federal Green Party in Parliament, said the federal government should "repair the environmental assessment legislation now partially undone by a totally predictable ruling."

"Federal environmental assessment needs to focus on actions of the federal government," she said in a Green Party statement. "We need to restore predictable assessment of projects involving clear federal jurisdiction, projects involving federal money, federal land and permits from federal authorities. In other words, at long last, this government must restore the pre-Harper approach to environmental reviews."

May called Bill C-69 "a tragic error" at many levels. "C-69's drafters ignored the advice from the expert environmental law panel, reduced dramatically the number of projects reviewed and made the whole process highly discretionary," she said. "In doing so C-69 exceeded federal jurisdiction. These are some of the reasons I voted against C-69 and pressed for amendments to repair it at the time."

In his 216-paragraph majority reasons for judgment, Chief Justice Wagner affirmed that "it is open to Parliament and the provincial legislatures to exercise their respective powers over the environment harmoniously, in the spirit of cooperative federalism" and that "both levels of government can exercise leadership in environmental protection and ensure the continued health of our shared environment."

In holding that the "designated projects" scheme of the IAA is ultra vires because the law's pith and substance goes beyond federal jurisdiction, the chief justice reasoned that the scheme requires the decision-maker to consider a host of factors but does not specify how those factors are to drive the ultimate conclusion. "The scheme's decision-making mechanism thereby loses its focus on regulating federal impacts," he explained. "Instead, it grants 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."

Chief Justice Wagner said both the screening decision and the public interest decision that are embedded in the federal regulatory scheme "are constitutionally problematic."

"The screening decision as to whether an impact assessment is required for a particular project must be rooted in the possibility of adverse federal effects," he explained. "However, because the decision-maker must take into account an open-ended list of factors, all of seemingly equal importance, only two of them tied to federal jurisdiction, an impact assessment could be required for reasons other than, or not sufficiently tied to, the project's possible impacts on areas of federal jurisdiction."

Similarly, the chief justice said, "the public interest decision must focus on the project's federal effects. However, because the mandatory public interest factors are not all confined to federal

legislative competence, and because some factors are framed in relation to the assessment of the project as a whole rather than to the adverse 'effects within federal jurisdiction', a determination of whether adverse federal effects are in the public interest is transformed into a determination of whether the project as a whole is in the public interest."

In addition, reasoned Chief Justice Wagner, the defined term "effects within federal jurisdiction" does "not align with federal legislative jurisdiction under s. 91 [of the *Constitution Act, 1867*], but rather, goes far beyond its limits. Its overbreadth manifests itself in two distinct ways. First, the definition of 'effects within federal jurisdiction' is central to the scheme's decision-making functions. Its overbreadth dilutes the focus at the key decision-making junctures, shifting it away from federal aspects and encompassing aspects that are within provincial jurisdiction. Second, the defined 'effects within federal jurisdiction' result in impermissibly broad prohibitions. Due to the overbreadth of these defined effects, the conduct prohibited by s. 7 of the IAA extends beyond the range of conduct that Parliament can validly regulate pursuant to its assigned heads of power."

In a detailed and extensive dissenting judgment, Justices Karakatsanis and Jamal said that the IAA's purpose and practical and legal effects indicate that the pith and substance of the "designated projects" scheme is to establish an environmental assessment process to (1) assess the effects of physical activities or major projects on 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 (2) determine whether to impose restrictions on the project to safeguard against significant adverse federal effects, unless allowing those effects is in the public interest.

"This description of the pith and substance is more precise and highlights the critical role of the public interest decision-making process under the legislation," they wrote. "Based on that characterization, the public interest decision-making process under the IAA is constitutional, provided that it is anchored in adverse federal effects 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."

Photo of Chief Justice Richard Wagner: Supreme Court of Canada Collection

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