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ALBERTA COURT OF APPEAL FINDS CANADA'S *IMPACT ASSESSMENT ACT* UNCONSTITUTIONAL

12 minute read

16 May 2022

Articles

A recent decision by a majority of the Alberta Court of Appeal[1] held that the Impact Assessment Act[2] is ultra vires Parliament. This is the first case to address the constitutionality of the IAA, and it should garner significant attention from industry, Indigenous Nations, local communities and governments across the country.

Introduction to the *Impact Assessment Act*

The Impact Assessment Act was enacted by the federal government on June 21, 2019[3] to replace the Canadian Environmental Assessment Act, 2012.[4]

Among other things, the IAA introduced new factors that the federal government must assess, including the project's impact on Canada's ability to meet its climate change commitments, and a new test to determine whether a "designated project" is in the public interest.[5] However, the IAA did not fundamentally change the way in which federal assessment of a project is triggered. The former CEAA 2012 introduced the novel approach of triggering that Act where the project was a "designated project" on a list approved by Cabinet or Ministerial order. Under CEAA 2012, there was no explicit requirement that there be a federal 'hook' such as a federal permit or location on federal lands. Likewise, under the IAA, projects trigger the IAA if they fall within one of the project categories listed in the

Physical Activities Regulations[6] (commonly referred to as the "Project List"). This Project List includes projects such as hydroelectric and mining projects that are generally subject to provincial jurisdiction because they are located on provincial Crown lands.

Importantly, the IAA does not make federal assessment automatic for a project listed in the Regulations. Instead, for all designated projects, the IAA requires that there be a planning phase leading to a decision by the Impact Assessment Agency of Canada on whether impact assessment is required.[7]

On September 10, 2019, the Government of Alberta referred two questions to the Alberta Court of Appeal regarding the constitutional validity of the IAA.[8] Alberta and Canada were parties to the Reference, with Ontario and Saskatchewan (among others)[9] intervening in support of Alberta's position.

The majority decision of the Alberta Court of Appeal

In a 4-1 decision, the majority of the Alberta Court of Appeal held that the IAA is unconstitutional. In doing so, the majority made the following findings:

- The pith and substance of the IAA (i.e., its essential character) 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" [emphasis added];[10]
- The IAA is unlike the federal environmental assessment regime at issue in the 1992 decision of the Supreme Court of Canada in Friends of the Oldman River v Canada.[11] The IAA (like CEAA 2012) is not simply an "information gathering" regime that supplements existing federal regulatory regimes. The IAA is both an information gathering regime and a regulatory regime. It provides the federal government with authority to regulate any project on the Project List . following a wide-ranging federal assessment. Thus, by its terms, the IAA supports federal assessment and regulation of intra-provincial projects that do not otherwise engage any federal jurisdiction and would not otherwise be subject to any federal regulation or oversight;[12] and
- Through its public interest test and prohibitions, the IAA effectively grants the federal government a veto power over any project, including projects that would not otherwise be subject to federal jurisdiction.[13]

The majority held that the IAA intrudes into provincial jurisdiction and the provinces' proprietary rights as owners of their public lands and natural resources. In particular, the

majority concluded that Parliament's claimed power under the IAA to regulate all environmental and other effects of any project improperly intrudes into industrial activity, resource development, local works and undertakings and other matters within provincial jurisdiction.[14] Accordingly, the majority concluded that the IAA is unconstitutional.[15]

The dissenting opinion also devotes attention to the Oldman decision. It advances the position that there is not a constitutional issue with the IAA implementing information gathering on designated projects and also regulating them. Although Oldman examined the provisions of the Navigable Waters Protection Act[16] separately from federal environmental assessment under the Environmental Assessment and Review Process Guidelines Order[17], the dissent advises that this legal separation of federal requirements is not a constitutional necessity by the terms of Oldman. The dissent ultimately concludes that the IAA is constitutional because it remains principally an information-gathering regime[18] and its approach to project regulation through conditions is linked to federal jurisdiction.[19]

Implications of the decision

The Alberta Court of Appeal's majority opinion clearly puts in question the legality of federal decision-making over intra-provincial projects and other projects located off of federal Crown lands, or that do not otherwise impact a federal head of jurisdiction. Moreover, the reasoning of the majority of the Court of Appeal puts into question the legality of certain kinds of assessments and decision-making under CEAA 2012.

Shortly after the Reference decision was issued, the federal government stated that it will appeal to the Supreme Court of Canada, which it can do as of right.[20] We are now clearly in a period of major legal uncertainty, pending a decision by the Supreme Court of Canada. Proponents of designated projects under the IAA or CEAA 2012 should review the basis for federal assessment of their protect to determine if the project is subject to the issues decided by the Alberta Court of Appeal. At this time, there is a very foreseeable risk that a federal impact assessment proceeding without regard to federal regulatory powers could be rendered unnecessary if the IAA is eventually struck down or narrowed in a manner that excludes that project from federal review or approval.

Next steps

We will monitor future developments regarding the constitutionally and application of the IAA. Please contact us if you require assistance in understanding the implications of this decision on your interests and/or projects.

[1] Reference re Impact Assessment Act, 2022 ABCA 165 ["Reference"].
[2] Impact Assessment Act, SC 2019, c 28 ["IAA"].
[3] This is the date on which the IAA received Royal Assent.
[4] Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52 ["CEAA 2012"].
[5] IAA, s. 22(1)(i).
[6] Physical Activities Regulations, SOR/2019-285. ["Regulations"].
[7] This initial step to determine if impact assessment is required has some similarities to the screening process required by CEAA 2012 for designated projects that did not require the approval of a regulator such as the Canadian Energy Regulator or the Canadian Nuclear Safety Commission.
[8] More specifically, Alberta's Lieutenant Governor in Council made an OIC referring two questions to the Court. This nuance seems unnecessary. The two questions were: 1. Is the IAA partly or wholly outside of the federal Parliament's legislative authority and therefore unconstitutional? 2. Are the Physical Activities Regulations (Project List) partly or wholly outside of Parliament's authority to enact because they apply to provincially-regulated projects?
[9] The other interveners in support of Alberta's position were: the Woodland Cree First Nation, the Indian Resource Council, the Canadian Taxpayers Federation, the Canadian Association of Petroleum Producers, the Canadian Energy Pipeline Association, the Explorers and Producers Association of Canada, the Independent Contractors and Businesses Association, and the Alberta Enterprise Group.
[10] Reference at para 372.
[11] Reference at paras 219-226.
[12] Reference at paras 373(1) and (2).
[13] Reference at para 373(10).
[14] Reference at para 421.
[15] Reference at para 426.
[16] Navigable Waters Protection Act RSC 1985, c N-22
[17] Environmental Assessment and Review Process Guidelines Order SOR/84-467
[18] Reference at paras 592-593 (dissent).
[19] Reference: see, for example, para 513 (dissent) with reference to s. 64 of the IAA.
[20] Joint Statement of Ministers Steven Guilbeault and David Lametti regarding the Alberta Court of Appeal's decision (via Twitter).

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