

Christopher Yung
416-865-2976
cyung@litigate.com



Margaret Robbins
416-865-2893
mrobbins@litigate.com

November 2, 2023

The Designated Projects Scheme, Not A Designated Survivor: The Supreme Court Weighs in on the Federal Environmental Assessment Regime

The complexity of regulating environmental impacts in Canada has proven to be a thorny issue on both constitutional and practical fronts. On the heels of 2021's carbon pricing decision, the Supreme Court of Canada has again weighed in on how the division of powers can impact environmental regulation. This time, the Court considered the federal environmental assessment regime, ultimately finding that the federal legislation waded too far into provincial waters.

Background

The *Impact Assessment Act* ("*IAA*") and its accompanying *Regulations* came into force in 2019, replacing the Harper government's *Canadian Environmental Assessment Act, 2012* as Canada's new federal impact assessment regime. Impact assessment is a process used to evaluate the effects of a project on people, the economy, and the environment. The *IAA* differed from its predecessor in several ways: it created a single assessment body (three agencies previously shared this mandate), introduced measures to promote the participation of Indigenous peoples, and added a new planning phase to the impact assessment process.

The *IAA* can be divided into two distinct schemes:

- "designated projects", which are major projects with the most potential for adverse effects in areas of federal jurisdiction – federal authorities must evaluate designated projects using the *IAA*'s three-step impact assessment process, comprised of a planning phase, an impact assessment phase, and a decision-making phase; and
- the federal project scheme, which applies to a narrow set of activities carried out or financed by federal authorities on federal lands or outside Canada.

When the *IAA* was passed, the government of Alberta challenged what it viewed as an intrusion on provincial jurisdiction, referring the question of the constitutionality of the *IAA* and the *Regulations* to the Court of Appeal of Alberta. A majority of the Court of Appeal ruled in *Reference re Impact Assessment Act* that both were unconstitutional in their entirety. The Attorney General of Canada appealed the decision.

The Supreme Court of Canada Decision

The majority of the Supreme Court concluded in a 5-2 decision that the *IAA* was unconstitutional in part. Specifically, the designated projects scheme was unconstitutional, whereas the federal projects scheme under ss. 81 to 91 could be separated out and was upheld as constitutional.

Writing for the majority, Chief Justice Wagner began by acknowledging the competing interests Parliament must grapple with when enacting environmental legislation, finding that environmental protection is one of the most significant challenges facing the government. However, Chief Justice Wagner went on to note that Parliament continues to have a duty to act within the division of powers framework.

The Court also addressed the applicability of the double aspect doctrine in the environmental context, finding that where elements of environmental assessments fall within provincial jurisdiction and other elements within federal jurisdiction, each level of government may only pass legislation that is in pith and substance within their own jurisdiction.

The Court found the designated projects regime exceeded the bounds of federal jurisdiction for two reasons. First, the scheme was not in “pith and substance” directed at regulating “effects within federal jurisdiction” because those effects did not drive the scheme’s decision-making functions. The Court took issue with the screening decision within the planning phase and the public interest determination within the decision-making phase, criticizing them as insufficiently focused on federal impacts.

Secondly, Parliament’s definition of what constitutes “effects within federal jurisdiction” was overbroad and misaligned with federal legislative jurisdiction under s. 91. The Court was not convinced by the *IAA*’s emphasis that designated projects should be evaluated based on their “effects within federal jurisdiction.” Chief Justice Wagner found that “[t]he mere fact that certain effects are defined as being “within federal jurisdiction” is, of course, not determinative of their status within the constitutional division of powers.”

The majority decision ultimately concluded that the *IAA* designated project regime extended too far into provincial

jurisdiction to be tenable under the division of powers constitutional framework.

Justice Karakatsanis and Justice Jamal provided a dissenting decision, in which they held that the *IAA* was a valid exercise of the Parliament's jurisdiction. The dissenting decision focused on the inherently complex nature of regulating environmental issues given the overlapping areas of jurisdiction in the Constitution. Focusing on a cooperative approach, the dissenting Justices held that the *IAA* was not an overreach by Parliament.

Takeaways

The impact of the Supreme Court of Canada's decision has not been fully realized yet. The Government has not announced what changes it will make to the *IAA* regime to comply with the Court's decision. It is clear that regulating environmental concerns will continue to be a thorny subject for Provincial and Federal governments as legislators try to both provide comprehensive environmental assessment legislation which respects the constitutional limits of the federal and provincial governments.

For proponents and opponents of designated projects which have either gone through the *IAA* process or are currently within that process, the Supreme Court's decision may provide grounds to challenge any decisions made pursuant to the *IAA*.

What is clear following this decision is that the designated project regime did not prove to be a designated survivor when the Constitution was applied.