

Supreme Court Finds Bill C-69 Environmental Assessment Law Partly Unconstitutional



Friday the 13th. Such a fitting date for a decision like this. Friday, October 13, 2023, will long be remembered as the day the Supreme Court of Canada ruled that the federal *Impact Assessment Act* (IAA), previously known as Bill C-69, intrudes on the provinces' constitutional rights to regulate environmental matters within their own boundaries. Here's a quick briefing on this blockbuster ruling and its probable impact.

The IAA

The obligation of companies to undergo review of the potential environmental impact of the projects they propose to undertake has long been a staple of environmental law. Historically, the environmental impact process has been carried out by the provinces and territories in accordance with provincial and territorial law. However, the federal government has authority to regulate projects that are inter-provincial in scope.

So, the federal government ignited a controversy in 2019 by introducing legislation, Bill C-69, giving itself the right to evaluate the environmental, social, cultural and heritage impacts of a wide range of 'designated projects' listed in the regulations. The IAA basically bans proponents and federal authorities from doing anything in connection with a 'designated project' without first completing the impact assessment process. The controversial part of the law is that 'designated projects' include not just **inter-** but also **intra-provincial** development, construction, commerce and other activities historically regulated solely by the provinces.

A group of provinces, led by Alberta, went to court claiming that the IAA was unconstitutional. In May 2022, Alberta's highest court, the Court of Appeal, ruled that in adopting the IAA, Parliament unconstitutionally infringed on the constitutional rights of provinces to regulate and manage their own natural resources [*Reference re Impact Assessment Act*, 2022 ABCA 165 (CanLII), May 10, 2022]. The federal government appealed, and the case went to the Supreme Court of Canada.

The Supreme Court Ruling

By a 5 to 2 vote, the Supreme Court held that at least parts of the IAA do, in fact, go too far. While the federal government has the constitutional authority to establish a federal impact assessment regime, the IAA's 'designated projects' provisions are *ultra vires*, that is, beyond Parliament's legislative authority and thus unconstitutional.

The basic problem with the IAA is that it allows for federal regulation of projects and activities that have little to no significance on inter-provincial matters. Accordingly, in insinuating the federal government into these essentially local matters that are constitutionally reserved for the provinces to regulate, the IAA impermissibly exceeds the federal government's jurisdiction.

In coming to this decision, the Court stressed the importance of maintaining a constitutional balance between federal and provincial powers. While protecting the environment is an essential national objective, it must be carried out within the framework of the Constitution, the Court reasoned [*Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII), October 13, 2023].

Fallout & Practical Significance of the Ruling

It's a big deal any time the Supreme Court strikes down even part of a federal regulatory scheme as an intrusion on provincial powers. While much of the IAA remains intact, the federal government will now have to go back and amend the impugned 'designated projects' provisions to ensure they're limited to projects involving clear federal effects and don't encroach on provincial regulatory authority.

However, the stakes go beyond this one particular piece of legislation. The federal government has recently initiated other wide-reaching regulatory programs targeting climate change, natural resources and other environmental matters that have drawn protest from the provinces. The IAA ruling casts new doubt on the constitutionality of these laws, particularly the proposed oil and gas sector emissions cap and Clean Electricity Regulations designed to achieve net-zero electricity by 2035.

The ultimate result might be to force the federal government away from unilateral action in favour of closer consultation and coordination with the provinces and territories on major environmental initiatives. And that's not necessarily such a bad thing.