May 24, 2022

Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the *Impact Assessment Act* is Unconstitutional

By: Martin Olszynski

Opinion Commented on: *Reference re* Impact Assessment Act, 2022 ABCA 165 (CanLII)

On May 10, 2022, the Alberta Court of Appeal released its lengthy and long-awaited opinion in *Reference re* Impact Assessment Act, 2022 ABCA 165 (CanLII). A majority of the Court of Appeal (Chief Justice Fraser, Justice Watson, and Justice MacDonald) concluded that the *Impact Assessment Act*, SC 2019, c 28, s 1 (*IAA*), Part 1 of Bill C-69, was *ultra vires* (i.e. beyond) Parliament's legislative authority pursuant to section 91 of the *Constitution Act, 1867*. Justice Strekaf concurred in the result. Justice Greckol dissented, concluding that the *IAA* was indeed constitutional. In my view, Justice Greckol's dissent is both clearer and more consistent with current Canadian constitutional and environmental law doctrine. The majority's opinion, on the other hand, is relatively difficult to follow, includes basic doctrinal errors in some parts, and ignores or strays far from precedent in others. In this and other ways, the majority's approach is strongly reminiscent of its earlier opinion in *Reference re* Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 (CanLII) (*GGPPA Reference ABCA*) (see post here), which was overturned by the Supreme Court of Canada in *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (CanLII) (*GGPPA References SCC*) (see posts here, here, and here). The federal government has already confirmed that it will appeal the majority's opinion to the Supreme Court, pending which the *IAA* regime will remain in force (reference opinions not being strictly binding the same way that judgments are).

This post is the first in a series on the *IAA Reference*. Part I begins with a very brief primer on the *IAA* regime. Part II summarizes the majority opinion, flagging and discussing some of the key issues and problems along the way (subsequent posts will provide more detailed commentary with respect to these and other issues). At its core, the majority's analysis, which often appears outcome-driven, is a refutation of shared jurisdiction over the environment, and envisions instead federal subordination to provincial policies and preferences. Part III concludes by situating the majority's opinion within a brief history of Canadian environmental law and policy.

I. A Brief Primer on the *IAA*

Like its immediate predecessor, the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA, 2012*), the *IAA* is primarily a "major project" assessment regime – i.e. the regime applies only to Canada's largest natural resources and infrastructure projects. The starting point for such assessments is the *Physical Activities Regulations*, SOR/2019-285, colloquially referred to as the Project List, which lists over sixty (60) types of projects (e.g. mines, highways, dams, etc. above a certain production or size threshold) selected on the basis of their potential to result in

impacts on areas of federal jurisdiction (at least according to the Regulatory Impact Analysis Statement (RIAS) that accompanied them). When projects on this list are proposed by proponents, they enter a six-month screening and planning phase, which starts with the submission of an initial project description (ss 8 – 16). At the end of that phase, an assessment is commenced unless the Agency determines that one is not required, in which case it is essentially released from the federal regime, or the Minister determines that the project will result in unacceptable effects within federal jurisdiction and notifies the proponent accordingly (s 17). For projects undergoing assessment, section 22 sets out an expanded list of factors (relative to *CEAA, 2012*) that the Agency or, in the case of a review panel, that panel, must consider. Following the completion of an assessment, the Minister, or the Governor in Council in some instances, decides whether the project's effects on areas of federal jurisdiction (as defined in the *IAA*) are in the public interest, taking into account a set of mandatory factors, including the significance of those effects, mitigation measures, impacts on the rights of Indigenous peoples, the project's contribution to sustainability, and the project's contributions to climate change (ss 60 – 66) (for more detail, see this article by my colleague David Wright).

II. The Majority Opinion

A. Setting the Stage

The majority begins with relatively extensive stage-setting before finally engaging the applicable "division of powers" framework at paragraph 164. This stage-setting includes an introduction (at para 1 – 33), a summary of the parties' arguments (at paras 34 – 39), the relevant provisions of *The Constitution Act, 1867*, and *The Constitution Act, 1982*, a summary of the existing caselaw regarding the environment, the history of the provinces and the natural resources amendment (s 92A), the role of the Courts in such disputes (at paras 40 – 81), an overview and history of federal and provincial environmental assessment legislation (at paras 82 – 145), a section on foundational constitutional principles, and finally a discussion on Indigenous peoples in the federalism context (at paras 145 – 158).

The majority covers a lot of ground here, seemingly laying out general principles of established law that frame – and constrain – the subsequent legal analysis. In important ways, however, the foundation laid by the majority departs from established Supreme Court precedent. For example, the majority purports to summarize the basic principles with respect to jurisdiction over the environment at paragraph 9, but includes a rather conclusory statement that has no direct precedent in Canadian constitutional or environmental law jurisprudence:

> Under the Constitution, the "environment" is not a head of power assigned to either Parliament or provincial Legislatures: *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at 63 [*Oldman River*]. That being so, when either government level legislates for purposes relating to the environment, that legislation must be linked to a specific head of power within its jurisdiction… Accordingly, Parliament is not entitled, on the basis that Canadians nationally share legitimate concerns about the environment and climate change, to legislate and regulate on the environment generally. Nor is Parliament entitled to require federal oversight and approval of intra-provincial

> activities otherwise within provincial jurisdiction on the basis of the environmental effects of those projects, and factors, not linked, or not sufficiently linked, to a federal head of power. (at para 9, emphasis added)

This passage also contains a term, "intra-provincial activities" or "intra-provincial designated projects" (see also para 13), that appears integral to the subsequent constitutional analysis. In *Oldman River,* the Supreme Court of Canada explicitly cautioned against such framing ("What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a 'provincial project' or an undertaking 'primarily subject to provincial regulation'…" (at 68)). The majority eventually acknowledges this caution (at para 106) but ultimately disregards it:

> Nevertheless, identifying which government level has the exclusive jurisdiction for the subject activity is not a trap but rather a necessary part of a division of powers analysis. The reference to "exclusive" jurisdiction is, after all, the written text of the Constitution itself. That text is the foundational basis for constitutional interpretation. The exclusivity principle means something in constitutional law. It helps the court identify, and focus on, which government level has the "primary" jurisdiction for the subject activity as a whole and which has a "limited" jurisdiction vis à vis some aspects only of that activity or none at all. That necessarily includes zeroing in on the limitations inherent in the scope of the head of power of each government level. (at para 107, footnotes omitted)

Of course, it is the *power to make laws* that the *Constitution Act, 1867* describes as "exclusive" to one level of government or the other ("to make Laws in relation to Matters coming within the Classes of Subjects"), not the physical works or activities that may be subject to a given legislative regime. In other words, it is actually not helpful, and probably misleading, to focus on the projects and activities that may be subject to a given legislative regime when discussing exclusivity, which is why *Oldman River* cautioned against it: "That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation" (at 68).

The majority also hints, at paragraphs 17 and 18, at another anchor in its analysis, which is the imposition of a judicial threshold (level of harm) that must be met before Parliament may legislate with respect to the environmental dimensions of its legislative authority (see also para 198), which it then combines with an unprecedented – and frankly incorrect – application of the "incidental effects" doctrine (pursuant to which the constitutionality of a law from one level of government is upheld notwithstanding that some part of that law appears to fall within the jurisdiction of the other government, which transgression is deemed as being "incidental"):

> Under the *Act*, Parliament has regulated what it has defined as "effects within federal jurisdiction" from a designated project and what it characterizes as "adverse effects within federal jurisdiction" from that project… That is the hook Canada claims anchors its jurisdiction over intra-provincial designated projects that do not otherwise require a federal permit. However, while those changes or impacts may

> be "effects within federal jurisdiction" for purposes of the Act, that does not make all of them effects within federal jurisdiction for purposes of the division of powers.
>
> Parliament's self-definition of "effects within federal jurisdiction"… includes effects not within its constitutional jurisdiction when applied to intra-provincial designated projects – namely, the incidental effects of provincial laws (authorizing intra-provincial designated projects) on a federal head of power, effects not linked, or not sufficiently linked, to a federal head of power and effects that do not even qualify as significant. And therein lies another instance of federal jurisdictional overreach under this legislative scheme. (at para 17 –18, emphasis in original)

As further discussed below, the incidental effects doctrine acts as a shield to uphold laws, not as a sword to strike them down. As for the judicial imposition of a "significance" threshold, this would seriously hinder Parliament's ability to assess and manage the cumulative impact of numerous projects that individually may not be significant but that collectively exert significant effects on areas of federal jurisdiction (see William E Odum, "Environmental Degradation and the Tyranny of Small Decisions" (1982) 32:9 Bioscience 728). The inherent complexity of this challenge suggests strongly that the majority has steered beyond its judicial lane and into policy in this respect.

Speaking of policy-making, this stage-setting portion of the majority's opinion is laden with the same kind of extra-judicial reasoning, i.e. political statements, unsubstantiated policy preferences, and value judgments, that Nigel Bankes, Andrew Leach and I raised concerns about in the *GGPPA Reference ABCA*. The majority describes the *IAA* as placing the provinces "in an economic chokehold" (at para 25) and accuses Parliament of taking "a wrecking ball to the constitutional right of the citizens of Alberta and Saskatchewan and other provinces" to develop their natural resources, as well as to "the likelihood of capital investment in projects vital to the economy of individual provinces" (at para 28), by which the majority means oil and gas (at para 29). The majority insists – without substantiation – that the energy transition will take decades: "That time may be measured in double digits, if not three or possibly four decades, particularly if carbon capture, utilization and storage, the use of hydrogen and small modular nuclear reactors [SMNR] allow those resources to be developed in, or near, a net-zero manner" (at para 29, citing only the fact that several provinces have signed an MOU for the purposes of developing SMNR, which has no bearing on demand-side policies and reductions).

As in the *GGPPA Reference ABCA*, the majority also spends time on the resource amendment (s 92A), claiming that its purpose "was to ensure that the approval of projects for the exploration, development, conservation and management of 92A natural resources was vested exclusively in the province that owned them" (at para 81). These two aspects of the majority's opinion – extra-judicial reasoning and the resource amendment – will be the focus of future posts.

B. Division of Powers Analysis

In terms of the actual division of powers analysis, the majority begins by setting out the well-established two-step analysis that we also saw in the GGPPA References: characterization followed by classification: "First, the subject matter (or 'pith and substance') of the challenged

legislation must be characterized. Second, that subject matter must be classified by reference to federal and provincial heads of power…" (at para 164). Because the majority considered the *Project List Regulations* integral to the *IAA* regime, it analysed the two together.

Once again, however, the majority first takes a bit of a detour. We are reminded of the importance of keeping the two stages distinct (at para 173), the nature of the environment for the purposes of the pith and substance analysis (at paras 174 – 180), a discussion of Parliament's "Peace, Order, and Good Government" power and the holding in the *GGPPA References SCC* (at paras 181 – 185), and the concept of cooperative federalism (at paras 186 – 189). As above, the discussion with respect to environmental jurisdiction appears critical to the majority's analysis but again contradicts existing precedent:

> Therefore, where an activity, such as an intra-provincial designated project, is otherwise within exclusive provincial jurisdiction, Parliament's jurisdiction is limited to the environmental effects of that activity on a federal head of power. Accordingly, the fact one aspect of the environmental effects of an intra-provincial designated project, the fisheries aspect for example, falls within federal jurisdiction does not give Parliament the jurisdiction to regulate the intra-provincial designated project itself from beginning to end. If it did, that would be a back door route to the federal government's securing what amounts to exclusive jurisdiction over the environment and all intra-provincial activities. That is because where a conflict arises between federal laws and provincial laws, under the doctrine of paramountcy, the federal law would prevail. (at para 179, emphasis added, footnotes omitted)

There is a lot going on in this paragraph. The first underlined sentence appears to contradict the Supreme Court's holding in *Oldman River* that "once [an] initiating department has…been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction" (at 73, emphasis added), though I acknowledge that there is some lingering uncertainty over the meaning of the term "initiating department" in the legislation at issue in that case (the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 or *EARPGO*; in my view, it is doubtful that it had or has constitutional significance). The second underlined sentence conflates impact assessment with regulation (a recurring error throughout the majority's opinion), whereas the two are distinct both in theory and under the Act: the scope of assessment under the *IAA* is broad but the Act restricts the federal government's ability to impose conditions on projects to effects that fall within federal jurisdiction or those that are necessarily linked or incidental to the issuance of a permit or authorization (ss 64(1) – (2)), such as a *Fisheries Act* section 35 authorization for impacts to fish and/or fish habitat.

1. Characterization

Characterization involves identifying a challenged law's "dominant or most important characteristic" (at para 167) and involves an examination of "both the purpose of the law and its effects" (at para 168).

(a) The *IAA*'s Purpose

The majority begins by looking at the text of the *IAA* itself, including its preamble, and observes a "wide range of…federal priorities, such as 'enhancing global competitiveness', 'driving innovation', creating 'jobs', 'achieving reconciliation' and contributing to an 'inclusive' society for women, men and gender-diverse people" (at para 196). Combined with the Act's stated purpose and some extrinsic evidence, the majority concludes that the "purpose of the *IAA* is to establish a federal impact assessment and regulatory regime to review and regulate all effects of both federal designated projects and intra-provincial designated projects" (at para 205, emphasis in original).

(b) The *IAA*'s Effects

Turning to the *IAA*'s effects, the majority cites *Reference re* Environmental Management Act *(British Columbia)*, 2019 BCCA 181 (CanLII) at para 14, aff'd 2020 SCC 1 (CanLII), for the proposition that "effects may be legal ones such as effects on the rights or obligations of citizens; or practical ones, especially where there is reason to believe the enacting government may be attempting to do indirectly what it cannot do directly."

(i) Legal Effects

In what reads more like a "scale of impact on provincial jurisdiction" analysis under the Peace, Order and Good Governance (POGG) doctrine than a strict assessment of the *IAA*'s legal effects on proponents, the majority asserts that designation as a "designated project" has "serious negative consequences that flow immediately" (at para 207). This is because:

> The *IAA* triggers federal review of the "effects" of intra-provincial designated projects even where the federal government has no decision-making authority with respect to an intra-provincial designated project under other valid federal legislation. Further, Parliament has not limited the regulation of intra-provincial designated projects to effects actually within federal jurisdiction. And even where there are such effects, the regulation is not limited, as required under the division of powers, to the consequences, that is effects, of the subject project on a federal head of power. (at para 207)

Here and throughout the analysis that follows, the majority's approach is akin to what the Mikisew Cree described in their factum as allowing "the legislative tail to wag the jurisdictional dog" (at para 23). Existing legislation does not define the scope of legislative authority under sections 91 and 92 of the *Constitution Act, 1867*, nor is there any barrier preventing Parliament from legislating under several heads of power at the same time (*Oldman River* at 73; see also Justice Greckol's dissent, *IAA Reference* at para 445). Consequently, whether decision-making authority exists under other valid legislation should be irrelevant; what matters is whether the *IAA* itself is a valid exercise of federal legislative powers. The majority seems to recognize this at paragraph 224, footnote 138, but then complains within the same footnote the *IAA* "contains no legislative regulations relating to fisheries, species at risk, migratory birds or 'Indians, and Lands reserved for the Indians' with respect to intra-provincial designated projects. Parliament already has legislation on these subject matters."

The majority's attempt to narrow the scope of constitutionally permissible considerations when deciding whether a project's effects are in the public interest is also deeply problematic. The Supreme Court succinctly stated this problem in *Oldman River* in the context of the dam's need for a permit to interfere with navigation pursuant to what was then the *Navigable Waters Protection Act*:

> If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances. (at 39, emphasis added).

As further discussed below, the majority acknowledges and attempts to solve this dilemma later in its opinion by drawing a distinction between a favorable decision and a negative one (see paras 337 – 345).

It is also at this stage in the analysis that the majority appears to misapply the incidental effects doctrine:

> Third, if the federal executive could prohibit an intra-provincial designated project from proceeding simply because its effects may have some impact on a matter within a federal head of power, this would negate a key element of the pith and substance doctrine. Under the pith and substance doctrine, one level of government may validly legislate on matters within its jurisdiction in a manner that causes incidental effects on matters within the jurisdiction of the other level of government: *Canadian Western Bank* at paras 28-29; Hogg at §15:5. (at para 242)

With respect, the *IAA* does not negate the pith and substance doctrine because the purpose of "incidental effects," as part of the pith and substance doctrine, is not to shield the subject matter of provincial laws from federal laws but rather to uphold the constitutionality of those provincial laws even though they may trench on federal law-making power (and vice versa). The passage of the *IAA* (or any other federal legislation for that matter) does not change that. Moreover, and as noted by Justice Greckol in her dissent (at paras 703 – 708), the fact that such effects may be deemed "incidental" from the provincial perceptive does not mean they are incidental or substantively irrelevant from the federal perspective. Indeed, the opposite will often be the case – what is deemed incidental from a provincial perspective will often fall squarely within federal jurisdiction (including, for example, impacts to fish and fish habitat). One can argue that what the federal government describes as an incidental effect is in fact the main thrust of the legislation, and object to it on that ground, but the incidental effects doctrine has *never* been used to prevent the federal government from legislating in relation to matters that clearly fall within its jurisdiction. As alluded to by Justice Greckol in her dissent, judicial imposition of a substantive threshold of environmental harm clearly transgresses the separation of powers: "It is not for the courts to tell

Parliament at what point it is allowed to be concerned about harm to the environment in areas within its constitutional jurisdiction" (at para 709).

The majority also objects to what it considers to be a disconnect between the effects that trigger the Act's application and the factors that the federal government must consider when determining whether the project's effects on areas of federal jurisdiction are in the public interest:

> Sustainability [under the Act] is defined as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations"… While this is within Parliament's jurisdiction for federal designated projects, that is not so for intra-provincial designated projects. Parliament has no head of power giving it the right to authorize the federal executive to decide whether an intra-provincial designated project is in the public interest based on whether that project contributes to the social and economic well-being of the people of Canada. (at para 253)

Here again, the majority fails to acknowledge – let alone grapple with – binding precedent. Consider the following passage from *Oldman River* in particular, which draws a clear distinction between legislating in relation to a matter and subsequent decision-making:

> There is, however, an even more fundamental fallacy in Alberta's argument, and that concerns the manner in which constitutional powers may be exercised. In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of bona fides, these considerations will not detract from the fundamental nature of the legislation… (citing *Murphyores Incorporated Pty Ltd v Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.): "The considerations in the light of which the decision is made may not themselves relate to matters of trade and commerce but that will not deprive the decision which they induce of its inherent constitutionality for the decision will be directly on the subject matter of exportation and the considerations actuating that decision will not detract from the character which its subject matter confers upon it") (at 69-70, emphasis added).

The same logic is reflected in *Quebec (Attorney General) v Canada (National Energy Board)* 1994 CanLII 113 (SCC), [1994] 1 SCR 159 at 193: "If in applying [the *National Energy Board Act]*… the [National Energy] Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects… This co-existence of responsibility is neither unusual nor unworkable."

The majority goes on to consider the effects of the *IAA*'s prohibitions pursuant to sections 7 and 8 of the Act, the former prohibiting proponents from doing anything that results in a change to the environment within federal jurisdiction, the latter prohibiting federal departments from exercising any powers or functions that would allow a project to proceed, both pending completion of an assessment or decision that one is not required. In this context, the majority assesses these

prohibitions against existing regimes and caselaw under related federal laws such as the *Fisheries Act*, RSC 1985 c F-14.

With respect to fish and fish habitat, the majority asserts that there is a meaningful distinction between the *IAA*'s prohibition against any effect on fish habitat and the *Fisheries Act* prohibition against "harmful alteration, disruption, or destruction" (at s 35(1)), even though the plain wording of that prohibition and related jurisprudence make clear that it is indeed very broad in scope (see e.g. *R v BHP Diamonds Inc*, 2002 NWTSC 74 (CanLII) at paras 71 – 72: "harmful" modifies "alteration" but not "disruption"). Missing from this discussion, and indeed throughout the majority opinion (including its preoccupation with "significant" effects), is the recognition, first observed by the Supreme Court of Canada in *Ontario v Canadian Pacific Ltd*, 1995 CanLII 112 (SCC), [1995] 2 SCR 1031 and most recently affirmed in *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 (CanLII), that environmental laws are often by necessity framed in broad terms: "Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification" (*Ontario v Canadian Pacific* at para 43). Importantly, both cases post-date the fisheries jurisprudence that the majority relies upon to insist that the *IAA*'s prohibition on "any effect" on fish and fish habitat is unconstitutional (*Fowler v The Queen*, 1980 CanLII 201 (SCC), [1980] 2 SCR 213), which also ignored more recent authority with respect to the scope of the fisheries power: "…the fisheries power includes not only conservation and protection, but also the general 'regulation' of the fisheries, including their management and control… as a 'common property resource' to be managed for the good of all Canadians" (*Ward v Canada (Attorney General)*, 2002 SCC 17 (CanLII) at para 41, emphasis added).

The majority also tackles Parliament's invocation of transboundary effects as a basis for federal assessment and its consistency, or not, with the Supreme Court of Canada's holding in the *GGPPA References SCC*. Recounting the revised three-part test for a matter to qualify as one of national concern (it must be (1) "of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern"; (2) "a specific and identifiable matter that is qualitatively different from matters of provincial concern" and where there is "provincial inability to deal with the matter"; and (3) the scale of impact must be "reconcilable with the division of powers"), the majority concludes that the *IAA* fails the third part of the test (at para 285). This discussion, as well as the dissent's treatment of the same issue (at paras 633 – 639), will be the subject of subsequent posts.

Finally, with respect to legal effects, the majority returns to the public interest determination at the end of the process and, as noted above, purports to tackle the scope of permissible considerations. The analysis is as follows:

> As La Forest J pointed out in *Oldman River* at 39, it would be difficult to understand how the federal government could decide that a federal permit under the *Navigable Waters Protection Act* could be issued notwithstanding "harm" to navigable waterways unless the public interest in proceeding with the project warranted issuance of a federal permit. Thus, he made it clear that whether the project overall was in the public interest could be used to grant a federal permit.

> But notably, La Forest J did not state that if the federal government decided that a project was not in the public interest, that could be used to deny a federal permit. The theory that the results of a public interest assessment should work both ways holds to the view that if the federal government can use a positive public interest determination to grant or relax a federal permit, it should be able to use a negative public interest determination to deny the federal permit.
>
> However, this presupposes an equivalency between the two positions. Arguably, there is not. In the first case, the federal government is using a positive public interest determination as a reason to "stand down" from a veto it could otherwise use under one of its heads of power and instead support an intra-provincial designated project approved by the province. In doing so, the federal government remains within its constitutional lane. Nor is it harming any core competence of the provincial government. But the reverse is not necessarily so on either count.
>
> The federal government's power to deny a federal permit must be exercised for the right reasons. A denial must be based on the effects of the intra-provincial designated project on the federal head of power engaged, not on a negative public interest determination grounded in factors and considerations untethered to the head of power. Were the denial based on factors and considerations other than the actual effects of the project alone on, for example, the fisheries, the federal government would be operating outside its constitutional lane. In such circumstances, it would be using the federal executive's assessment of the public interest overall to deny the federal permit even if the actual effects of the project on a federal head of power did not warrant the denial… (at para 338 – 341, emphasis added)

The majority never clearly explains what might lead to a "positive public interest determination" – except its reference to provincial approval. This can't be correct; it subordinates federal authority to provincial preferences, whereas "[t]he Canadian federation guarantees the autonomy of both orders of government within their spheres of jurisdiction. Their relationship is one of coordination between equal partners, not subordination" (*GGPPA References SCC* at para 464 per Justice Rowe (in dissent but not on this point); see also *Ward* at para 30). But the subsequent reference to not harming the provinces' "core competenc[y]," coupled with the majority's invocation of interjurisdictional immunity as an alternative conclusion (at paras 428 – 430), makes plain the desired result of their entire opinion: some form of immunity from federal laws that may conflict with provincial policies and preferences.

As for the majority's insistence that denial must be for "the right reasons," the majority is actually right, though I suspect not in the way it thinks. As set out in sections 60 – 63 of the *IAA*, the question is whether the effects on areas of federal jurisdiction, which will generally be adverse and often significant in the major project context (for example, an oil sands mine could result in the loss of nearly 1 km^2 of fish habitat and potentially *irreversible* contamination of fish-bearing waters), are nevertheless in the public interest. That necessitates a comparison between what will be gained and what will be lost. The public interest factors (e.g. sustainability, climate change, and impacts on Indigenous peoples) are not unrelated impacts – they are more properly viewed as

guideposts ("*in light of* the factors") for the purposes of this cost-benefit analysis, the result of which will always be expressed in federal terms.

(ii) Practical Effects

Turning to practical effects, the majority brings up delay (at paras 358 – 361) and uncertainty (at paras 362 – 365). The majority also discusses the effective unavailability of legal recourse through judicial review. As elsewhere, this part of the analysis is difficult to follow. The majority dismisses the feasibility of challenging *Physical Activities Regulations* on the basis that "there is no 'line' delimiting what falls on the unreasonableness side" (at para 367, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) at para 105). It then skips directly to the decision-making stage, legal challenges to which it similarly dismisses as not feasible. At no point does the majority contemplate what seems like a fairly straightforward challenge to the application of the *IAA* to a specific project on constitutional grounds, which challenge would be reviewed on the correctness standard (as was the case relatively recently in *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100 (CanLII) or over thirty years ago with respect to the *Oldman River* dam).

In the end, the majority concludes that the pith and substance of the *IAA* regime 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" (at para 372). In contrast, Justice Greckol, whose dissent merits its own post, defined the *IAA*'s pith and substance as a "federal environmental assessment regime that facilitates planning and information gathering with respect to specific projects to inform decision-making, cooperatively with other jurisdictions, as to whether the project should be authorized to proceed on the basis that identified adverse environmental effects purported to be within federal jurisdiction are in the public interest" (at para 593).

2. Classification

Having characterized in this way, the majority proceeds to assess it against the various federal heads of power that are recognized as touching on the environment (e.g. fisheries, migratory birds, transboundary effects and Indigenous peoples). This analysis mirrors the analysis of the *IAA*'s legal effects for the purposes of characterization: the majority is of the view that the *IAA*'s scope exceeds each one of the heads of power relied upon by the federal government (at paras 384 – 408). In the result, the majority concludes that the *IAA* is *ultra vires* Parliament's authority and rather falls within provincial law-making authority. In the alternative, "the doctrine of interjurisdictional immunity should apply to protect what constitutes the 'core' of relevant provincial heads of power" – subject to actually defining what that core is (at paras 430).

III. Conclusion

In summary, the majority concluded that the *IAA* regime is not within Parliament's jurisdiction to enact. The essence of its analysis is effectively captured by the conclusory statement in paragraph 9 flagged near the beginning of this post: "Parliament [is not] entitled to require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction on the basis of

the environmental effects of those projects, and factors, not linked, or not sufficiently linked, to a federal head of power" (emphasis added). But as discussed above, the Supreme Court of Canada has already cautioned against framing projects as primarily subject to provincial jurisdiction, while the majority's imposition of a substantial threshold of environmental harm takes it well outside of its judicial role.

Reading the majority's opinion, there is a palpable sense of disbelief that federal environmental policies and preferences might validly affect – even contradict – provincial ones. To some extent, this disbelief may be understandable; numerous scholars (including myself) have previously observed a convention of federal deference to provincial preferences in the environmental and natural resources context (see also William R. MacKay, "Canadian Federalism and the Environment: The Literature" (2004) 17 Geo Int'l L Rev 25 at 34). As I've argued elsewhere, this convention of deference has been operative in Alberta for much of the past two decades, which saw massive growth and expansion of the oil sands industry at the expense of federal interests in fish and fish habitat, migratory birds, and greenhouse gas emissions, to name but a few.

But conventions do not have the force of constitutional law, and governments' priorities and preferences are allowed to change, especially in response to existential challenges (*GGPPA References SCC*, at para 167). Nor is Parliament prohibited from passing laws that may affect or even conflict with provincial policies and preferences: "Consequential effects are not the same thing as legislative subject matter. It is 'the true nature and character of the legislation' — not its ultimate economic results — that matters" (*Attorney-General for Saskatchewan v Attorney-General for Canada* 1948 CanLII 317 (UK JCPC) at 123).

Contrary to the majority's repeated (30 times) insistence, the *IAA* does not give the federal government a "veto" over resource projects – certainly no more than provincial regimes give one to the provinces (see also Justice Greckol's dissent at paras 710 – 730). Rather, the *IAA* reflects what Justice Rowe recently described as a "relationship…of coordination between equal partners, not subordination" (*GGPPA References SCC* at para 464). Sometimes partners agree, sometimes they don't. The result is not unconstitutional – it's federalism.

I am grateful to Nigel Bankes, Andrew Leach, Sharon Mascher, David Wright, and Sara Hastings Simon for comments and suggestions on an earlier version of this post. Any errors and mistakes remain my own.

This post may be cited as: Martin Olszynski, "Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the *Impact Assessment Act* is Unconstitutional" (May 24, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/05/Blog_MO_Carbon_Tax_Reference.pdf