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Supreme Court of Canada Will Soon Rule on the Constitutionality of the Federal *Impact Assessment Act*. Here's What to Watch for...

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Matter Commented On: Forthcoming Supreme Court of Canada reference case in the Matter of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, [SC 2019, c 28](#) and the *Physical Activities Regulations*, [SOR/2019-285](#); and the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, [RSA 2000, c J-2, s 26](#)

For anyone interested in impact assessment in Canada, this is a suspenseful time. The Supreme Court of Canada (SCC) is expected to soon release its ruling on the constitutionality of the federal *Impact Assessment Act*, [SC 2019, c 28](#) [IAA] and the associated Physical Activities Regulations, [SOR/2019-285](#) (the latter setting out the list of projects that trigger application of the regime). My Environmental Impact Assessment Law seminar students and I are set to dive deeply into the decision as soon as it drops, and no doubt many others plan to do similar. For now, this short post sets out ten things to watch for. (For those interested in deeper dives into this statutory regime and how we got here, see my previous publications [here](#), [here](#) and [here](#)).

Before turning to the issues, I would like to dedicate this post to Dr. Meinhard Doelle. Just over a year ago, Meinhard was killed while cycling in rural Nova Scotia. No words suit this unspeakable tragedy, and the grieving continues. Meinhard was a model environmental law scholar, mentor, colleague, friend, and community member. His contributions on all fronts were extraordinary and too numerous to count (for some context see [here](#) and [here](#)). Indeed, *he* was extraordinary. Meinhard's ability to bring a principled and inclusive approach to society's most complex law and policy challenges was unmatched, and always came with the sincerest of smiles. One area for which he had a special passion and deep wisdom was impact assessment. He literally wrote the [book\(s\)](#) on it, and was a trusted source of knowledge and advice across spheres of private practice, not-for-profit, government, and academic institutions. No doubt many of us are thinking of him frequently as we anticipate the release of this SCC ruling. Whatever the outcome, Meinhard would have engaged by embracing the complexity with his energetic, evidence-based, hope-filled ways that continue to inspire so many of us.

1. Direct Answers to the Reference Questions Posed

This is a reference case, not the typical lawsuit between parties. A reference case happens when a federal or provincial government asks the court to provide its opinion on a particular legal issue (see [here](#) for a helpful explainer). In the present context, Alberta posed questions to the Alberta Court of Appeal (ABCA), seeking an opinion on the constitutionality of the federal impact assessment regime. In a 4:1 split decision, a majority of the ABCA said the regime was not

constitutional (*Reference re Impact Assessment Act*, [2022 ABCA 165 \(CanLII\)](#) [ABCA Reference]). Canada then appealed to the SCC. That hearing took place in March 2022, and the Court’s opinion is expected to be released soon.

In a nutshell, using two related questions, the Alberta government asked whether the IAA and its regulations are constitutional “in whole or in part” (ABCA Reference at para 4). The Supreme Court of Canada will respond to these questions, but one thing to watch for on this front is the extent to which the SCC parses the issues. For example, they could find that the IAA is constitutionally valid in whole, but the regulations are unconstitutional in part. Or they may rule that there are parts of the Act that are unconstitutional, but the project list regulations are fine. On the former, for example, there remains a chance that the SCC will actually agree with the majority of the ABCA that the inclusion of *in situ* oil sands projects on the project list is not constitutional, presumably because there is not a strong enough link to a federal head of power (more on this below). It is difficult to predict whether, and if so how, the SCC might separate out these issues, and what the fallout of such parsing will mean. If a majority of the Court does find any part of the IAA or regulations unconstitutional, legislative amendments will almost certainly ensue. In any event, to the extent that any aspect of the regime is ruled to be unconstitutional, the details and nuance will matter a lot (and so beware of both simplistic cheerleading and tantrums).

2. Majority Versus Minority Opinions

Most who follow this area of the law would agree that a unanimous decision from the SCC is unlikely. The Court is expected to split. The dividing line(s) may well resemble those seen in the split bench in *Re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) [*Re GGPPA*]. One twist in the current context is that the SCC sat as a bench of seven for the IAA case, not the usual nine (due to Justice Russell Brown being on leave from the Court at the time). The good news here is that the composition of the bench was still an odd number, meaning that even if they split there will still most likely be a majority opinion that carries the day and provides sufficient certainty to carry on with whatever constitutional analysis the majority sets out. I say “most likely”, however, because there is a chance that the Court will be badly fragmented with several different opinions going in various directions (for an example of this in a non-reference context, see *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018 SCC 40 \(CanLII\)](#)). That would be a very unfortunate outcome because it would mean the legal landscape is foggier than ever, and therefore very difficult for Parliament, provinces, proponents, and the public to navigate.

3. Response to (Rebuke of?) of the ABCA Opinion

As my colleagues have aptly described on ABLawg [here](#) and [here](#), the ABCA majority opinion engaged in an unusual degree of extra-judicial reasoning and rhetorical claims of exclusive jurisdiction. This was particularly so in relation to greenhouse gas emissions and climate change, where the ABCA majority characterized federal regulation of greenhouse gas emissions as intruding on the lives of citizens and pointed to examples (in fairness, acknowledged by the majority to be extreme ones) of measures such as to “[s]top eating beef”, to “[s]top driving vehicles of any kind”, to “[s]top eating as much” and to “[s]hut down all the cement plants” (at para 294). This type of rhetoric and judicial commentary is abnormal to say the least (see discussion by Nigel Bankes [here](#)). As such, it will be interesting to see the extent to which, beyond agreeing or

disagreeing with the ABCA's majority and minority analyses and conclusions, the SCC responds to, or perhaps even calls out, this type of content from the ABCA majority opinion.

4. *Oldman* Clarity #1: Scope of Assessment

The constitutional landscape in which today's federal impact assessment sits is largely a product of the 1992 landmark case of *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 SCR 3. That case laid down a key foundational aspect that is likely to be center-stage in the IAA reference. In that case, the SCC majority indicated that when the federal government engages in the assessment of a project, the scope of that assessment can be very broad, including environmental repercussions but also including socio-economic concerns and economic benefits (*Oldman* at 72). In saying so, the SCC also explained that the scope of that assessment is not confined to the federal head(s) of power that stand to be adversely impacted (at 72). The SCC explained this point using federal authority over interprovincial railways as an example (at 69-72). However, *Oldman* did not provide complete clarity. Open legal questions have lingered around what limits there might be on federal assessment of other projects, namely natural resource projects for which the federal government does not have explicit authority.

The ABCA majority was very pre-occupied with this issue, pointing to the example of an *in situ* oil sands project wholly within the province, but for which the federal government has situated itself under the IAA to engage in a comprehensive assessment leading to final approval or rejection (see e.g. ABCA Reference at para 284). In the time since *Oldman*, the prevailing view has been that the federal government does have a constitutional basis to engage in comprehensive assessment and decision-making with respect to such projects (see this ABlawg [post](#) by Profs Martin Olszynski and Nigel Bankes). But not everyone has agreed. As pointed out by Meinhard Doelle in his 2008 book on federal assessment, there is a narrower view attributed to Steven Kennett that suggests comprehensive federal jurisdiction only applies if the project is referred to directly or by implication of a federal head of power (at 67). It was that line of argument that the ABCA picked up in this case. And so, a key aspect to watch for in the SCC opinion is whether federal constitutional authority will be somehow circumscribed for some types of projects or certain aspects of the regime (e.g. scope of assessment or final decision-making). If a majority does indeed go the route of constitutionally limited federal authority, expect federal impact assessment to be changed forever. It would be the most significant development since 1992.

5. *Oldman* Clarity #2: Federal Heads of Power

Related to point #1 above, *Oldman* was very clear on the proposition that the federal assessment regime may relate to several heads of power simultaneously (at 72); See also *Canadian Wildlife Federation Inc v Canada (Minister of the Environment)*, [1989 CanLII 7273 \(FC\)](#), [1989] 3 FC 309 (TD), *aff'd* (1989), 99 NR 72 (FCA). Typical examples include fisheries and navigation. One aspect to watch for in the forthcoming SCC ruling is how this point will be confirmed and possibly restated with more clarity and with explicit reference to the IAA and regulations. A key aspect to watch is how the SCC will articulate what the nexus between the federal head(s) of power and the federal legislation must look like, and, further to issue #1 above, whether the scope of federal assessment and decision-making is somehow different based on the head of power engaged.

In addition to watching for what will likely be broad statements about the *IAA* relying on several heads of power, it will also be interesting to see what the SCC has to say about specific heads of power. For example, while federal authority in relation to fisheries and navigation, and interprovincial pipelines and powerlines are relatively clear, there are open questions about the role of other heads of power in terms of the extent to which they serve as a basis for federal *IA* legislation. Two key examples are POGG and s 91(24). I now turn to those.

6. POGG Power in Federal Impact Assessment

Oldman was not particularly helpful in explaining what role the federal residuary power of “Peace, Order, and good Government” (POGG) may play as a constitutional basis for a federal assessment regime. Instead, the majority simply stated, “in any event, it falls within the purely residuary aspect of the ‘Peace, Order, and good Government’ power under s 91 of the *Constitution Act, 1867*” (at 73). In today’s Gen Z hip speak, this would be a “wait, what?!” moment. It is fair to say that no one had a full understanding of what this meant, let alone what it means in relation to today’s *IAA*. And so, the POGG power is an important issue to watch in the forthcoming SCC opinion. The SCC may choose to once again side-step the issue and instead hinge their analysis on the typical federal heads of power (as the federal government has tended to do over the years), but perhaps not. Given that the SCC was forced to dive deeply into the POGG power in *Re GGPPA*, they may feel compelled to speak to it in the *IA* context as well, if only to further settle the dust on that important but seldom tested federal head of power.

7. Section 91(24) Head of Power, Including *IAA* - C-92 Linkages

Under s 91(24) of the *Constitution Act, 1867*, Parliament has broad jurisdiction with respect to “Indians, and Lands reserved for Indians” (notwithstanding lexicon that is arcane and widely viewed as problematic). The *IAA* embraces this jurisdiction by integrating deeper consideration of the rights and interests of Indigenous peoples throughout the Act (for detailed commentary, see [here](#)). Such use of this federal head of power in impact assessment is not new. Indeed, it was one of the powers discussed by the SCC in *Oldman*. But there has remained some uncertainty around the extent to which this head of power can support federal impact assessment legislation. As such, this will be an important aspect to watch in the SCC ruling.

This is particularly the case because the s 91(24) aspect of *IAA* constitutionality is part of a broader legal context of uncertainty around what s 91(24) means for federal and provincial jurisdiction in general. Of even greater consequence in this realm (and more suspense at the moment) is another SCC reference case that is set to also be released imminently, that one originating in the Quebec context regarding [Bill C-92](#), *An Act respecting First Nations, Inuit and Métis children, youth and families*. In short, that Act aims to establish national standards for the provision of child and family services by providing a mechanism through which Indigenous laws can take priority over inconsistent federal and provincial laws governing the delivery of child and family services to Indigenous peoples (for insightful commentary and more information, see this [post](#) by my colleague, Dr. Robert Hamilton). The reference case asks whether that law is a valid exercise of the federal government’s s 91(24) head of power. Given its square focus on s 91(24), that SCC opinion will no doubt speak extensively about this head of power, including the relationship between s 91(24) and s 35 of the *Constitution Act, 1982*, and in doing so it will hopefully shed light on this aspect of the *IAA* reference. Because these two references are being considered by the

SCC at virtually the exact same time, one would reasonably expect that the opinions will reference each other in an attempt at consistency and clarity. All of this, of course, is happening in the context of Canada's commitment to full implementation of the United Nations Declaration on the Rights of Indigenous Peoples ([GA Res 61/295 \(Annex\), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 \(2008\) 15](#)) (UNDRIP), so expect both SCC rulings to include at least some consideration of what UNDRIP means in relation to the *IAA* and Bill C-92.

8. Climate Change, Impact Assessment, and Federal Heads of Power

Yes, we've known about human-induced climate change for a long, long time. But not long enough to have included it in the constitution. So Canada's constitution, of course, does not assign responsibility for addressing climate change. Rather, this is another instance of shared jurisdiction between federal and provincial governments who rely on their respective related heads of power to engage in addressing climate change through legislative measures. Impact assessment has a role to play in addressing climate change, for example by gathering information on carbon-intensive projects and then deciding how such projects would impact achievement of Canada's emission reduction commitments. And it was on this logic that explicit climate change provisions were included in the *IAA*. But the constitutional basis for federal assessment of these aspects of a project would benefit from more clarity. The federal government has done a relatively poor job of explaining the link between this aspect of the *IAA* and federal heads of power. Expect the SCC to speak to this aspect pointedly, including how climate change impacts are becoming omnipresent and, as such, have impacts on the usual federal heads of power such as fisheries and navigation.

9. Presumption of Constitutionality and the Role of Judicial Review

The presumption of constitutionality dictates that if the text of legislation can be interpreted as constitutionally valid, courts should favour the meaning that supports constitutionality. A key issue to watch for in the SCC's opinion is the extent to which the Court relies on this presumption to say that a constitutional interpretation of the *IAA* and regulations is indeed possible, and so that interpretation applies. It is difficult to predict just how much work this presumption might do in the SCC opinion, but it may be the case that the Court will not rely on it too heavily, preferring instead to engage in a robust and exhaustive constitutional analysis before also pointing to this presumption as further support.

It will also be interesting to see the extent to which the SCC acknowledges that because a reference case is inherently abstract (just a government's legal question posed without a fact-rich legal dispute), it would be most appropriate to address some of the difficult legal dimensions on a case-by-case basis in the form of judicial review of an actual federal government decision under the *IAA* and regulations. Put another way, the SCC may take the view that the reference is focused on the existence of federal authority rather than the exercise of such authority. This would be a stark contrast from the ABCA opinion, which was very pre-occupied with how such federal authority *might* be exercised.

10. More ABlawg Commentary to Come

One thing is for certain – numerous ABlawg posts will follow soon after the SCC releases its opinion from the likes of Profs Sharon Mascher, Martin Olszynski, Nigel Bankes, yours truly, and possibly others. Watch for that in the days and weeks ahead.

Thanks to my colleagues Nigel Bankes, Martin Olszynski, Sharon Mascher, and Shaun Fluker who reviewed drafts of this post. And thanks to Dr. Sara Seck and Professor Jennifer Koshan for reviewing and cross-posting on both the Dalhousie Environmental Law News Blog and ABlawg, respectively.

Disclosure statement: *In addition to being interested in this reference case given my teaching the Environmental Impact Assessment Law seminar in this area this fall, I was also co-counsel for one of the intervenors at the SCC where we made submissions in support of the constitutionality of the IAA, including climate change aspects. Additionally, I am a member of the federal [Impact Assessment Roster](#), which is comprised of experts who may serve on independent review panels.*

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