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Not Plenary, but Not Nothing Either: Greenhouse Gas Emissions in the Supreme Court Opinion on the (un)Constitutionality of the Federal Impact Assessment Regime

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Case Commented On: *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#)

The Supreme Court of Canada (SCC) recently released its opinion on the constitutionality of the federal impact assessment (IA) regime. In a 5:2 majority opinion, Chief Justice Richard Wagner concluded that much of the scheme is unconstitutional for projects falling primarily within provincial jurisdiction. ABlawg has published initial reflections (see [here](#) and [here](#)), as well as a [primer](#).

One aspect of the majority opinion and any forthcoming legislative amendments that is in need of further attention is the Court’s analysis of greenhouse gas emissions. This post focuses on that aspect. In short, the majority reiterated that there is no plenary federal power to regulate greenhouse gas emissions, and found that Canada had not adequately made the legal argument to support inclusion of a designated project’s greenhouse gas emissions as a basis for triggering the *Impact Assessment Act*, [SC 2019, c 28, s 1](#) (IAA) or for making final decisions. However, the majority left the door open on this aspect, while also clarifying that there are no constitutional constraints during the assessment phase (i.e. information gathering phase) of the federal process. At the present juncture, the SCC opinion provides *some* valuable additional clarity regarding greenhouse gas emissions, but very far from *total* clarity. Uncertainty remains, and that is unfortunate. In the following discussion, I lay out what the majority said and did not say on greenhouse gas emissions, what that means, and what’s next.

What the Majority Said (and What it Means)

At the outset, it is important to underscore that the majority found that once the assessment is properly triggered there are no constitutional constraints on the scope of the assessment phase: “the assessment phase, on its own, does not involve an unconstitutional exercise of federal legislative authority”, and “at the assessment stage, the federal government is not restricted to considering environmental effects that are federal in nature” (at para 157). Put in plain terms, this means that the federal process can gather as much information as it wants. This is consistent with the precautionary nature of impact assessment, which the majority explicitly endorsed (see para 146). Clearly, this type of broad authority to gather information during the assessment phase may include information about greenhouse gas emissions and associated climate change impacts. That is all constitutionally permissible. However, the federal authority narrows from there.

The majority dealt with the greenhouse gas emissions aspects of the federal IA regime by primarily focusing on one of the defined “effects within federal jurisdiction”: interprovincial effects (at paras

183 – 189). The majority found problems with the entire definition of “effects within federal jurisdiction”, stating that effects as articulated “go far beyond the limits of federal legislative jurisdiction”, and that “[t]his overbreadth reinforces the conclusion that the pith and substance of the scheme cannot be classified under federal heads of power” (at para 179). The majority summarized the scheme’s “four decision-making junctures” (i.e. designation of projects, screening decision, scope of assessment, and final decision-making and oversight; at para 181), and then determined that effects within federal jurisdiction “influence each of these key decision-making junctures” (at para 182), which then renders the scheme unconstitutional.

For greenhouse gas emissions specifically, the majority focused on key features in the interprovincial effects definition from section 2 of the *IAA*. The relevant parts of that definition are as follows:

effects within federal jurisdiction means, with respect to a physical activity or a designated project...

(b) a change to the environment that would occur...

(ii) in a province other than the one where the physical activity or the designated project is being carried out

Citing the also “expansive definition” of the term “environment” in s 2, the majority found that the “breadth of this ‘interprovincial effects’ clause is astonishing” (at para 183), and that the clause “therefore captures an unlimited range of interprovincial environmental changes” (at para 184). The majority interpreted this broad definition to expressly permit “projects to be designated, assessments to be required and public interest decisions to be made on the basis that a project emits greenhouse gases that cross provincial and national borders” (at para 184).

Wagner C.J. then pointed the finger directly at Canada for essentially speaking out of both sides of its mouth. The majority found that “[w]hen pressed at the hearing of this appeal, Canada asserted that it is not relying on greenhouse gases as a basis for anchoring jurisdiction over major projects. It is plain, however, that the broadly worded ‘interprovincial effects’ clause permits Canada to do just that” (at para 187). The majority also found that the “record demonstrates that the federal government has adopted this very interpretation of ‘interprovincial effects’”, citing several examples, including letters from the federal minister to proponents of the proposed [Coalspur mining project](#) and the [Suncor Base Mine Extension Project](#), wherein the minister indicated that the projects’ greenhouse gas emissions would have “unacceptable environmental effects” (at para 188).

This did not sit well with the majority, which concluded that Canada was “attempting to do an end run around this Court’s recent national concern jurisprudence” (at para 189). Wagner C.J. did acknowledge that “preventing marine pollution and preventing pollution of interprovincial rivers are matters of national concern” under the POGG power (at para 189); however, he concluded that “Canada has made no attempt to apply the clarified national concern framework set out in the *References re GGPPA* or to lead any evidence on which to base the recognition of a new and broader matter of national concern” (at para 189).

Wagner C.J. reiterated that there is no plenary federal constitutional authority with respect to greenhouse gas emissions: “the matter of national concern recognized by this Court in the *References re GGPPA*, 2021 SCC 11 (“re GGPPA”) does not extend to enabling the federal government to comprehensively regulate greenhouse gas emissions” (at para 186). As such, “the inclusion of such sweeping regulatory powers in impact assessment legislation is likewise impermissible” (at para 186), and “the ‘designated projects’ scheme’s defined interprovincial effects lack specificity as to the type or scale of the ‘change to the environment’ that is said to be a federal effect” (at para 186).

While this part of the majority opinion is quite clearly a robust rapping of Canada’s knuckles, the door on federal regulation of greenhouse gases is far from closed. Rather, and as noted briefly in our previous [ABlawg post](#), this means that there remains the opportunity for the federal government to amend the *IAA* and, most importantly on the greenhouse gas issue, to amend the interprovincial effects clause to be sufficiently circumscribed to satisfy the POGG national concern framework set out in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) (*re GGPPA*).

An in depth analysis of what such amendments might look like is beyond the scope of this short blog post; however, my preliminary view is that something to the effect of the following would be a good starting point: ‘effects within federal jurisdiction means, with respect to a physical activity or a designated project... a *significant adverse environmental* effect that would occur... in a province other than the one where the physical activity or the designated project is being carried out’. This reformulation introduces the significance threshold, which the majority endorses (see e.g. para 193), while keeping the focus on transboundary harm. This change also focuses on a project’s impacts/effects as opposed to just greenhouse gas emissions, which would address the majority’s concern around the broad definitions capturing even small amounts of greenhouse gas emissions crossing a border.

This proposed narrowing, when coupled with the already high thresholds in the list of designated projects (notwithstanding ministerial discretionary designation power), could be sufficiently “narrow and specific” (at para 186, citing *re GGPPA* at para 199) to satisfy the POGG national concern framework. It is important to keep in mind that the projects on the project list are, of course, massive in scale and clearly of national significance. And presumably such amendments would also be aided by other circumscribing amendments (e.g. to the project list, screening decision, and final decision-making provisions), that carefully tie all “four decision-making junctures” to federal jurisdiction. The key here is amending the *IAA* in a manner where the matter of national concern is sufficiently narrow. At the risk of going too far with such preliminary thinking, the new matter could be something to the effect of ‘significant adverse transboundary impacts from the greenhouse gas emissions of major natural resources and infrastructure projects’. Again, much more analysis is needed to fully develop and road-test such an approach. A particularly challenging dimension would be the scale of impact step of the national concern test.

What the Majority Did Not Say (and What that Means)

The majority did not engage meaningfully with the broader context of climate change and potential adverse impacts from a proposed project’s greenhouse gas emissions. So, unlike the dissent, and unlike the majority views in *re GGPPA*, the majority did not meaningfully engage with climate

change as a global existential problem. While the dissent reiterated that “the environmental harms caused by climate change pose ‘an existential challenge’ and ‘a threat of the highest order to the country, and indeed to the world’” (at para 226, citing *re GGPPA*), the majority did not go there. However, neither did the majority walk back any of those statements from *re GGPPA*. This means that those important SCC statements from *re GGPPA* remain good authority (notwithstanding that *re GGPPA* was also just a reference case). The majority did at least reiterate that greenhouse gas emissions “represent a pollution problem that is not merely interprovincial, but global, in scope” (at para 184).

The majority also did not say that the POGG national concern power was unavailable as a federal head of power supporting federal IA legislation. Indeed, the Court reiterated that “preventing marine pollution and preventing pollution of interprovincial rivers are matters of national concern” (at para 189). With respect to greenhouse gas emissions in particular, the majority simply said that the federal government had not made out the case for impacts from project-related greenhouse gas emissions as a separate and distinct matter of national concern (at para 189). As noted above and in our previous [post](#), this means the SCC did not close the door and it is up to Canada to put forward appropriate amendments that are in turn substantiated by a robust POGG national concern branch argument.

Unfortunately, the majority did not engage much further on other (non-POGG) potential heads of power and greenhouse gas emissions in relation to the IAA’s decision-making junctures and definitions. Specifically, the majority did not discuss the alternative argument that a proposed project’s greenhouse gas emissions could have significant adverse effects on areas of federal jurisdiction such as fisheries and navigation *within* the province in which a primarily provincially regulated project is situated. As such, the majority opinion does not diminish an assertion of federal jurisdiction on the basis that a proposed intra-provincial high emissions project, such as an oil sands mine, could have adverse impacts on areas of federal jurisdiction such as fisheries, navigation, and the rights and interests of Indigenous peoples. In today’s in-your-face climate impacts context, this argument is far from a stretch. Clear and present examples would include rise in sea-levels, increased storm intensity, invasive species, and exacerbated droughts and wildfires.

Using s 91(24) of the *Constitution Act, 1867* as an example, from my perspective there is a strong argument here, even if one adopts a narrow interpretation of federal jurisdiction under that head of power (see this [post](#) by my colleague Robert Hamilton for detailed views on the s 91(24) dimensions of the majority opinion). The basic logic is that greenhouse gas emissions from a proposed high emissions project have adverse impacts on the welfare of Indigenous peoples of Canada. The relevant real world climate impact facts are painfully clear to see, most notably through the recent extreme and record-breaking wildfires forcing evacuations and health emergencies in numerous Indigenous communities across northern and western Canada.

Having said this, an assertion of federal jurisdiction on this basis would have to contend with the all too common climate change non-causation counter argument suggesting that a single project does not ‘cause’ any given set of adverse impacts. In the Canadian constitutional law context however, it is important to recognize that the SCC may have already quieted that counter in *re GGPPA* by acknowledging the nature of climate change being a collective action problem and stating that individual provinces and “individual sources of emissions” cause measurable harm and

may have tangible extra-provincial effects and contribute to global climate change (*re GGPPA* at paras 188-189).

Unfortunately, the SCC did not engage with this type of argument in the *IAA* reference, meaning that this too is a remaining area of uncertainty.

What's Next?

To understand what happens next, it is important to understand the historical context with respect to greenhouse gas emissions and federal impact assessment. Inclusion of a proposed project's expected greenhouse gas emissions in the federal assessment process is not new. It happened under the first federal legislative regime and it happened under the second federal legislative regime (see a detailed discussion [here](#)). There is case law on this, for example dealing with the question of whether a joint review panel's lack of attention to greenhouse gas emissions was reasonable (see *Pembina Institute for Appropriate Development v Canada*, [2008 FC 302](#) (CanLII)). As I've said previously, the *IAA* should be seen as an attempt to bring order and transparency to this realm through explicit statutory provisions and associated detailed guidance (see my previous commentary [here](#) and [here](#)). Unfortunately, however, according to the SCC majority opinion, the *IAA* was off the mark.

So where does that leave things? Well, further to the above discussion, it is now up to the federal government to decide whether to pursue continued inclusion of greenhouse gas emissions as a basis for designating projects and decision-making under the *IAA*. The door is open to them to do so, and in my view they have at least the two above-described arguments to put forward, one under POGG and one under the more conventional heads of power. Presumably there are difficult discussions happening on this in Ottawa right now.

Looking beyond the specific IA realm, however, reveals important context. The federal government is now forced to decide how hard to push to include the greenhouse gas emissions aspects of the *IAA*. The SCC provided some clarity, but not enough for the federal government to proceed in a sure-footed manner. If the federal government's proposed amendments include greenhouse gas emissions as a basis for triggering the *IAA* and for decision-making, presumably with some kind of significance threshold, it is foreseeable that there will be more litigation that pushes courts to focus entirely on this aspect to determine what amount of greenhouse gas emissions and associated impacts are needed to provide the federal government with constitutional authority to approve or reject a project.

And so, the choice is between proceeding along an uncertain and litigious pathway, or simply backing off. The latter may be attractive and here's why. Under the current approach of the federal government, impact assessment is far from the most important tool in any pathway to meeting Canada's international climate change commitments, including net-zero by 2050. To be clear, it very much should be (see the detailed discussion by Dr. Meinhard Doelle [here](#), and see this [relevant example from Australia](#)), especially given the long lifespans of the types of major projects that engage the federal *IAA*. However, under the present federal approach, impact assessment is not a key tool. In fact, impact assessment has no stated role to play in the pathway to 2030 that is articulated in the federal [2030 Emissions Reduction Plan](#). The extent to which this is intentional and due to the government being constitutionally timid and anticipating strong pushback is unclear.

In any event, it is other measures such as direct regulation (e.g. vehicle emissions and coal-fired power plants), infrastructure spending and tax credits, and carbon pricing that do most of the heavy lifting. And so, while this is a complex and fascinating issue from a constitutional law perspective, there exists a pragmatic argument that suggests that there may be little value in continued inclusion of greenhouse gas emissions in the federal IA regime. That is, with one exception, and that exception entirely survived the SCC majority's scrutiny.

There are virtually no constitutional constraints on the federal government gathering information about a proposed project's greenhouse gas emissions and any associated climate change impacts. This is because, as noted above, the majority held that the federal government can "*gather information* about a wide range of factors in conducting an environmental assessment" (at para 160) and that the long list of factors in s 22 "does not pose a constitutional issue" (at para 161). This authority within federal IA is not fettered in the way that decision-making is. One of the most valuable contributions of inclusion of greenhouse gas emissions in IA is this gathering of information. Arguably, it could help the government develop a bird's eye view of the nation's emissions today and tomorrow. Information gathering can also act as an important mechanism for public participation and public understanding about the extent to which high emissions projects fit or don't fit in decarbonisation pathways. All of these attributes of federal IA in relation to greenhouse gas emissions remain intact.

In my view, even if the federal government backs away from greenhouse gas emissions as a pillar of the federal regime, this feature of the assessment phase must remain. It could even be expanded (think downstream emissions and [social cost of carbon](#)). Put in real terms, most of the [guidance](#) that is now in place with respect to climate change and greenhouse gas emissions under the *IAA* may not have to change much, given that it was directed at the information gathering requirements of the Act. The federal government will, however, have to be careful that when it comes to the "ultimate decision-making juncture, the focus on federal impacts must be restored" (at para 177).

Concluding Perspectives

Just this week, the federal Commissioner of the Environment and Sustainable Development (CESD or Commissioner) released the first statutorily required [report](#) examining the extent to which Canada is on track to meet its climate change commitments (for a detailed account of that statutory regime, see [here](#)). The news was not good. The Commissioner found that while there has been some emissions reduction progress, "[t]he federal government is not on track to meet the 2030 target to reduce greenhouse gas emissions by at least 40% below the 2005 level by 2030" (at iii). A key shortcoming hampering progress is delay in getting key measures in place, including further regulations (at 16-18, see especially Exhibit 6.6). This underscores the importance of an "all of the above approach" to law and policy responses anchored in federal constitutional authority to put in place measures that will achieve reductions.

Unfortunately, uncertainty remains in the wake of the SCC opinion as to the extent to which federal IA is an available tool. As noted above, the SCC left the door open to Canada to make the case; however, that is far from a certain path. The present juncture is an important one. If the federal government is having trouble getting regulatory measures in place, as noted by the CESD, then IA could be viewed as more important than ever. And it seems that it really is now or never.

As I've said to my students many times in recent weeks, the SCC majority provided some helpful (but not total) clarity with respect to the lane within which the federal government may enact IA legislation; however, it remains to be seen if the federal government will put forward amendments that extend right to the curbs. And when it comes to greenhouse gas emissions those curbs are more like uneven gravel shoulders. As such, it is entirely foreseeable, particularly in the current political context, that the government tries to keep it on the straight and narrow. But in a constitutional context where the federal government is without plenary power to regulate greenhouse gas emissions, IA is not nothing. And it is far from dead. In fact (and in law), it may well still be something significant. The assessment phase should continue to serve the government and Canadians well through detailed information gathering about projects' emissions and associated impacts, and time will tell whether the *IAA* may also serve as a measure to actually achieve reductions in greenhouse gas emissions.

Thanks to my colleagues Martin Olszynski, Sharon Mascher, Nigel Bankes, and Shaun Fluker who provided comments on drafts of this post.

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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