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Environmental Federalism at a Crossroads – Not Appealing the *Impact Assessment Act* Reference Case is a Generational Missed Opportunity

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Matter Commented On: *Reference re Impact Assessment Act*, as amended, 2026 ABCA 320 (CanLII)

Ottawa has just accepted, without a fight, a narrow view of federal power that will limit Canada's ability to act on environment and climate for generations. How so? The federal government recently announced that it will not appeal the Alberta Court of Appeal's opinion that the amended *Impact Assessment Act* (IAA, the Act) is still unconstitutional. Instead, it will amend the law a second time, making it even weaker. Alberta's premier declared another win for her province.

The decision not to appeal is about more than the fate of one statute. It raises a fundamental question about the future of environmental federalism. At a time of accelerating environmental and climate crises, Canada needs constitutional law that enables governments to work together in a context of legal clarity that does not unnecessarily limit the ability to protect the environment. By giving up the chance to ask the Supreme Court for its opinion on jurisdiction over impact assessments, Ottawa has accepted the Alberta Court of Appeal's narrow view of jurisdiction – a decision that has broader constitutional implications that are deeply concerning. This is a generational missed opportunity.

Environmental Federalism Has Historically Been Enabling, Not Restrictive

For more than 50 years, the Supreme Court has interpreted the division of powers in ways that preserve the capacity of both orders of government to protect the environment. Decisions such as *R v Crown Zellerbach Canada Ltd.*, 1988 CanLII 63 (SCC), *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), *R v Hydro-Québec*, 1997 CanLII 318 (SCC), and *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 (CanLII) favoured interpretations that accommodate overlapping responsibilities and enable both levels of government to respond to environmental harms within their spheres of jurisdiction. This flexible approach makes constitutional sense. Pollution crosses boundaries. So do ecosystems, species and wild spaces. Environmental harms are cumulative, interconnected and often irreversible, as examined in detail in *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII). Canada's constitutional framework must accommodate these realities rather than impose artificial divisions that leave governments unable to respond. The Supreme Court has understood this for many years, including in the cases listed above and others.

Indeed, this enabling approach was reaffirmed in the 2021 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII) (*GGPPA References*). The Supreme Court rejected a zero-sum view of federalism and upheld the federal carbon pricing backstop while preserving provincial room to act to address what the court described as the existential threat of climate change.

The *IAA Reference* Marked a Troubling Departure

Less than three years later, a 5–2 majority of the Supreme Court struck down the heart of the IAA in *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII) (*IAA Reference*, 2023). The majority was concerned that the law was insufficiently focused on effects within federal jurisdiction and that its broad wording risked providing the federal government too much power to regulate projects with only minor federal consequences.

The contrast between the two references is not simply about different outcomes, however. Even though both were penned by Chief Justice Richard Wagner, the decisions are strikingly different. Whereas the *GGPPA References* emphasized the capacity of both orders of government to address a problem of national concern while preserving provincial autonomy, the *IAA Reference* adopted a more restrictive, formalistic approach, as discussed in a previous post (see this post as well). The majority in the latter opinion interpreted broad definitions of "environment" and "effects" literally and with suspicion, even though environmental statutes (federal and provincial) have used similarly broad language for decades and courts have consistently upheld it.

In a move that was surprising to many in the environmental law community, the majority declined to presume that the executive would apply those definitions within constitutional limits (*IAA Reference*, 2023 at paras 204 – 206). By contrast, the two dissenting Supreme Court judges would have upheld the Act based on strong precedent and presumed good faith toward Parliament (at para 222). The dissent in the Alberta Court of Appeal opinion, *Reference re Impact Assessment Act*, 2022 ABCA 165 (CanLII), would have also leaned on the presumption of constitutionality and a long line of case law that treats broad environmental language as functional, not suspect. It's difficult to imagine that the Supreme Court intended a wholesale retreat from its purposive, functional, and cooperative approach to environmental federalism in decades of jurisprudence. An appeal of the recent decision would have been a perfect opportunity for clarification. Instead, we are on track to miss a wide-open net that offers a chance for a goal shared by all: legal clarity in this fraught constitutional context.

Parliament's 2024 response to the Supreme Court's opinion shows why clarity matters. Many of the legislative amendments went further than the Court required, as discussed in this previous post. For example, instead of qualifying interprovincial effects with a significance threshold, as it did for other effects in the Act, it deleted the language on interprovincial air pollution altogether. That leaves a gap in the IAA for pollution originating in one province but harming another. In doing so, it leaves an important legal tool for addressing climate change in the toolbelt at a time when we need more policy levers, not less.

Yet even this overcorrected Act did not satisfy the Alberta Court of Appeal, which still held on October 9 (in a 4–1 split) that it was unconstitutional (see *IAA Reference*, 2026 at para 192). The

majority went to great lengths to imagine ways in which the Act could be applied unconstitutionally, rather than relying, as courts should, on the presumption of constitutionality and the availability of judicial review in specific future cases. More specifically, it continued to cast doubt on the federal government's jurisdiction over migratory birds (paras 115 – 120), Indigenous peoples and lands (at paras 134 – 138), and the scope of federal decision-making in relation to major projects that pose potentially significant adverse environmental effects on areas of federal jurisdiction (at para 187).

Similar to the dissents in the previous reference cases, the dissenting judgment of Justice Kevin Feehan found that Parliament had answered every concern the Supreme Court raised (at para 366). A split like that is exactly what an appeal exists to resolve. But Ottawa is declining to ask for clarification, choosing instead to continue its retreat from environmental law.

Cooperative Federalism Needs the Courts Too

The Supreme Court majority ended its 2023 opinion with a call to governments to exercise their powers over the environment "harmoniously, in the spirit of cooperative federalism" (*IAA Reference*, 2023 at para 216). But harmony does not mean one government walking away from the question. And it requires legal clarity.

Cooperative federalism does not operate in a constitutional vacuum. It operates in the shadow of the law. Governments negotiate pragmatic solutions precisely because courts, through judgments and reference opinions, have marked out where each can act. Such opportunities for clarity are rare, and in declining to appeal in the present context, Ottawa is trading long-term legal certainty for short-term political convenience. It's not worth it. Cooperation in which one side simply concedes the legal question is untethered deference, not clarity.

Perhaps Ottawa feared angering Alberta (again). But there is nothing inherently adversarial about now taking this second reference to the Supreme Court. The two governments could have adopted a cooperative stance and asked the Court to clarify the constitutional boundaries of federal impact assessment in a way that would provide greater certainty for both. That would have been cooperative federalism in action - not avoiding a constitutional disagreement but resolving it. It would also be in line with an interest shared by governments, industry, and many stakeholders and rightsholders: regulatory certainty.

We Need Constitutional Law That Enables, Not Impedes, Environmental Protection

An enabling interpretation of the Constitution is not an argument for unlimited federal power. Provincial jurisdiction over natural resources and local matters is fundamental, and both orders of government need real capacity to act within their spheres. However, that can only happen when contours of the legal landscape are sufficiently mapped out. Declining to appeal is a huge missed opportunity at a time of generational change in environmental law.

Ottawa's choice here takes place in a dizzying set of broader decisions rolling back decades of progress on environmental law. From the still relatively new *Building Canada Act* (see discussion here and here) and the proposed Bill C-39, which give cabinet power to fast-track projects of

"national interest" and side-step key federal environmental laws in the name of speed, to the MOU with Alberta shelving the oil and gas emissions cap and suspending the *Clean Electricity Regulations* in that province, Ottawa is sending a clear signal that it cares far more about the economy than protecting human health and our environment. And it is doing so in a constitutionally timid manner, without the additional clarity the Supreme Court could provide. Put simply, the decision not to appeal senselessly accepts a narrowed view of federal jurisdiction to conduct (or avoid conducting) "look before you leap" impact assessments. It's like refurbishing the old family car but using only half the potential horsepower for a high-stakes trip. The current federalism crossroads begs for better.

For better or worse, Ottawa's decision not to appeal closes one chapter of the IAA saga. However, it should not close the door on an enabling vision of Canadian environmental federalism. At a time of accelerating climate and environmental harms, the Constitution must remain a framework for action, not a barrier to it. Hopefully Ottawa will seize future opportunities, rare as they may be.

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