SUPREME COURT OF CANADA

disponible en français

Case in Brief: Reference re *Impact Assessment Act*

Judgment of October 13, 2023 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2023 SCC 23

The Supreme Court rules the federal impact assessment scheme is largely unconstitutional.

In this case, the Supreme Court looked at the constitutionality of the federal environmental assessment scheme under the *Impact Assessment Act*, enacted by Parliament in 2019. The Court was asked to consider whether the Act and one of its regulations went beyond Parliament's legislative authority under the Constitution.

The Act and the regulations establish a complex information gathering and regulatory scheme in two parts. One part, which is set out in sections 81 to 91 of the Act, establishes an impact assessment process for projects carried out or financed by federal authorities on federal lands or outside Canada. It requires the federal authority, in such cases, to decide if the project is likely to cause significant adverse environmental effects. If so, it must then be determined whether these effects are justified in the circumstances.

The other part, which includes the remaining provisions in the Act and the regulations, outlines what projects are considered "designated projects" under the Act and makes them subject to federal review automatically.

Alberta's Lieutenant Governor referred two questions with respect to this scheme to the province's Court of Appeal — references are when governments ask courts for their legal opinion on a question of law. First, they asked whether the Act was unconstitutional, in whole or in part, as being beyond Parliament's legislative authority under the Constitution (the legal term for this is *ultra vires*). Second, they asked whether the regulations were unconstitutional, in whole or in part, because they applied to matters entirely within the legislative authority of the provinces under the Constitution. A majority of the Alberta Court of Appeal concluded that the Act and the regulations were *ultra vires* Parliament and therefore unconstitutional in their entirety.

The Attorney General of Canada appealed this decision to the Supreme Court. Unlike the federal government, which can direct reference questions straight to the Supreme Court, provincial and territorial governments must first direct reference questions to their courts of appeal. However, provincial and territorial opinions can be appealed to the Supreme Court as-of-right (automatically), which means they do not require leave (permission) to be heard by the Court.

The Supreme Court has allowed the appeal in part.

Although the process set forth in sections 81 to 91 of the Act is constitutional, the balance of the scheme is *ultra vires* Parliament and thus unconstitutional.

Writing for a majority of the Court, Chief Justice Wagner ruled that the reference questions should be answered in the affirmative: the federal impact assessment scheme is unconstitutional in part. While the constitutionality of sections 81 to 91 of the Act was not challenged, Chief Justice Wagner said that the process set forth therein is constitutional. However, the balance of the scheme — that is, the "designated projects" portion — is *ultra vires* Parliament and thus unconstitutional for two overarching reasons. First, it is not directed at regulating "effects within federal jurisdiction" as defined in the Act, because these effects do not drive the scheme's decision-making functions. Second, the defined term "effects within federal jurisdiction" does not align with federal legislative jurisdiction. The overbreadth of these effects exacerbates the constitutional frailties of the scheme's decision-making functions, he said.

As Chief Justice Wagner wrote, "[e]nvironmental protection remains one of today's most pressing challenges. To meet this challenge, Parliament has the power to enact a scheme of environmental assessment. Parliament also has the duty, however, to act within the enduring division of powers framework laid out in the Constitution". Moreover, the Chief Justice noted that "it is open to Parliament and the provincial legislatures to exercise their respective powers over the environment harmoniously, in the spirit of cooperative federalism", adding that "both

…cont'd

levels of government can exercise leadership in environmental protection and ensure the continued health of our shared environment."

Breakdown of the decision: ***Majority*****:** Chief Justice Wagner allowed the appeal in part, finding the process set forth in sections 81 to 91 of the Act to be constitutional, but the balance of the scheme to be *ultra vires* (Justices Côté, Rowe, Martin and Kasirer agreed) | ***Dissenting in part***: Justices Karakatsanis and Jamal said the Act and related regulations are *intra vires* in their entirety.

More information: Decision | Case information | Webcast of hearing

Lower court rulings: Judgment (Court of Appeal of Alberta)
