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LEGAL BACKGROUNDER: THE *IMPACT ASSESSMENT ACT* REFERENCE CASE

Summary of Key Issues and Arguments

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Background

West Coast Environmental Law has intervened on behalf of Nature Canada in the constitutional reference of the federal *Impact Assessment Act* (IAA) at the Alberta Court of Appeal. This legal backgrounder provides the context of the case, why it matters, and the main arguments of the parties and of Nature Canada.

The federal and provincial governments have the power to ask a court to review a law (or part of a law) on constitutional questions. These cases are called reference cases. In Alberta, section 26(1) of the ***Judicature Act*** permits the Lieutenant Governor in Council to refer any matter to the ABCA, which it does by Order in Council (OIC). On September 9, 2019, Alberta's Lieutenant Governor in Council made an OIC referring two questions to the Court:

1. Is the IAA partly or wholly outside of the federal Parliament's legislative authority and therefore unconstitutional?
2. Are the *Physical Activities Regulations* (Project List) partly or wholly outside of Parliament's authority to enact because they apply to provincially-regulated projects?

The parties to this reference are Alberta and Canada, and there are fourteen intervenors: Saskatchewan and Ontario (who oppose and partially oppose the IAA, respectively), seven non-government organizations and First Nations opposed to the *Act*, and five environmental and First Nations intervenors that support the IAA, including Nature Canada, represented by West Coast.

What this case is about, and why it matters

The IAA reference case will confirm the scope of federal authority to make informed decisions about projects that might harm the environment. In the seminal 1992 case ***Friends of the Oldman River Society v Canada (Minister of Transport)*** (*Oldman*), a majority of the Supreme Court of Canada upheld Canada's earliest environmental assessment process as a logical tool for gathering information in support of decision-making functions under other statues (like the *Fisheries Act*). The IAA differs from that earlier process in a few important ways:

1. **What gets triggered:** In the *Oldman* case, the environmental assessment process in question required projects to go through assessments if there was some other federal hook – e.g., the project was on federal lands, received federal funding, or required a federal permit or authorization. Under the IAA, projects do not necessarily need to have that federal hook – projects are listed in the Project List based on type and size, and the Minister can designate for assessment additional projects that are not on the list.

2. **What gets considered:** The IAA is the most expansive federal assessment process to date. Under it, assessments must consider all positive and negative environmental, social, economic and health effects, as well as 19 other factors, such as the extent to which the project fosters sustainability, the extent to which it helps or hinders Canada's ability to meet its environmental obligations and climate commitments, gender-based analysis-plus, and impacts on Indigenous peoples' rights and title.
3. **How decisions are made.** Under previous legislation, decision makers considered whether effects within federal jurisdiction (such as on fisheries and navigation) were significant, and if so, whether those effects were justified in the circumstances. The IAA asks decision makers to consider whether federal effects are in the public interest, in light of such factors as sustainability, climate commitments and impacts on Indigenous peoples and their rights.

Arguments

The parties

The thrust of **Alberta's argument** against the IAA (which is supported to various degrees by the intervenors opposed to the law) is that the IAA goes beyond the federal government's constitutional authority because it is overly broad, assessing any and all relevant impacts of projects regardless of whether those impacts are federal or provincial in nature. Additionally, in Alberta's view the IAA could potentially apply to projects over which the federal government has no constitutional authority. Alberta claims to have its own comprehensive environmental assessment and regulatory regime that renders federal impact assessment redundant, and asserts that federal assessment of natural resource projects under the IAA amounts to an attempt to manage and control Alberta's resources and economy, contrary to the constitutional division of powers.

Canada, in turn, **argues** that the IAA is squarely within federal jurisdiction. The federal government claims that the *Act* is designed to ensure that a project will not be subjected to an impact assessment unless it is known that the project will cause effects within federal jurisdiction (federal effects), and that decision-making is limited to considering the public interest of adverse federal effects.

Canada argues (we believe correctly) that section 92A of the Constitution (which grants to the provinces exclusive jurisdiction over natural resources) does not detract from federal constitutional powers, such as authority over fisheries and navigation, and that the IAA is designed to promote cooperation between federal and provincial governments.

Our arguments

In our factum, we make four main arguments on behalf of Nature Canada. The first is that the "pith and substance" of the IAA (the term the courts use to define a law's dominant purpose or true character) is focused on federal effects, such as impacts on fisheries, and effects that are caused by a federal regulatory approval or federal funding for a project. This characterization of the IAA is easily seen in its **decision-making provisions**, which require the Minister or Governor in Council to determine whether a project's federal effects are in the public interest.

Rather than being a veto over natural resource projects (as Alberta alleges), the purpose of the IAA is to avoid, mitigate or justify impacts on areas of federal jurisdiction. This focus is reflected in the *Act*'s **purpose provisions**, which include protecting the environmental, health, social and economic conditions within Parliament's authority from projects' adverse effects.

Our second main argument is that the *effect* of the IAA is similar to its purpose: in short, it helps federal decision-makers identify and then avoid, mitigate or justify adverse effects on areas of federal jurisdiction. That power is squarely within federal constitutional authority.

In *Oldman*, the majority of the Supreme Court found that it is not helpful to characterize undertakings as "provincial projects," or projects "primarily subject to provincial regulation," and that there is no wide-sweeping legal shield to protect projects regulated by provinces from valid federal legislation. It is within Parliament's power to prohibit activities with actual or potential harm to a matter within federal authority, and the IAA does not exceed this power.

In fact, the IAA may actually increase projects' chances of approval, compared to if they did not undergo federal assessment. Impact assessment is a planning tool aimed at identifying ways of designing projects so that they contribute to sustainability by avoiding or minimizing impacts, enhancing benefits, and ensuring that impacts and benefits are equitably distributed across generations and communities. To that end, in addition to the potential effects of a project, the IAA looks at **alternatives to the project, alternative means of carrying it out, and potential mitigation measures.**

In short, rather than a blunt yes/no regulatory tool, impact assessment helps proponents design projects to the satisfaction of government authorities, Indigenous peoples, and local communities.

Our third main argument is that the federal government should not have to prove that a project will result in federal effects before the assessment starts. Impact assessment is a tool for identifying the potential impacts of projects to inform decision-making. To require that information to be gathered before an assessment begins would be putting the cart before the horse.

Instead, reasonable possibility of federal effects should be enough to trigger an impact assessment. In most provinces, projects will also be undergoing provincial assessments, and the IAA contains a number of mechanisms that federal and provincial authorities (as well as Indigenous nations, where certain procedural steps are met) can use to coordinate their assessments and minimize duplication. In the event that an assessment shows no likely federal effects, the project may proceed.

Our final and main argument is that the federal government may consider all of a project's relevant impacts, benefits, risks and uncertainties when deciding whether to approve it and if so, under what conditions.

In *Oldman*, the majority held that it would defy reason to bar federal authorities from considering the broad environmental and socio-economic repercussions of projects that impact areas within federal jurisdiction. For example, many projects that require a permit to impede navigation, such as dams or bridges, do not improve waterway navigation, and so require the minister to "weigh the advantages and disadvantages resulting from interference with navigation," such as job creation or restricted navigability.

Thus, it should be within the federal government's power to consider relevant matters within provincial jurisdiction. As the Supreme Court of Canada recognized, a project's socio-economic benefits may justify its adverse impacts, regardless of whether those benefits are "federal" in nature.

It is likewise appropriate for decision-makers to consider all of a project's *adverse* impacts when determining whether federal effects are in the public interest. The Minister may decide, for example, that a mine's adverse impacts on fish, when considered together with its air pollution and health effects, outweigh the project's benefits. Similarly, she or he may impose conditions on an approval that enhance the mine's benefits – for

example, to ensure longer-lasting jobs for the local community – in order to find that the impacts on fish are in the public interest.

This viewpoint is supported by another Supreme Court of Canada case, ***British Columbia v. Canadian Forest Products Ltd***. In that case, a majority of the Court recognized the value of ecosystem services, or "the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities." Federal matters, such as fisheries and waterway navigation, are examples of such ecosystem services. Where projects cause federal effects, proponents are essentially seeking permission to use those ecosystem services.

As a result, when the Minister or Governor in Council is deciding whether federal effects are in the public interest, they are in essence deciding whether it is in the public interest to allocate – or even forsake – a federal ecosystem service to the project in question. Accordingly, it is not only appropriate, but indeed necessary to consider all a project's impacts, benefits, risks and uncertainties in order to make an informed decision as to whether federal effects are in the public interest.

In short, we argue that federal jurisdiction to trigger impact assessments is broad (broader even than Canada seems willing to claim). And while decisions must be rooted in federal jurisdiction, decision-makers may look at all of a project's impacts, benefits, risks and uncertainties when deciding whether its effects on federal matters are in the public interest.

The Alberta Court of Appeal has issued a **notice** that it will be releasing its opinion on the reference case on May 10th, 2022 at 11:00 am Mountain Time.

A final decision from the Supreme Court of Canada may be years away, in the event of a further appeal, so it may be a while before we know the scope of federal authority over environmental protection and assessment.

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