WHAT NOW?

The ongoing saga of Bill C-69

Marla Orenstein
Director, Natural Resources Centre

Marla Orenstein champions the responsible development of the West's natural resources for the benefit of all. Her focus has been on ensuring the well-being of communities in the context of development and change.

Colleen Collins, PhD
Vice-President

Colleen champions a model of federalism that finds strength in diversity and unity among Canadians across the country.

On May 10, 2022, the Alberta Court of Appeal issued their long-awaited ruling on the constitutionality of the federal government's Impact Assessment Act (formerly known as Bill C-69).

In a nutshell, the Alberta court found that the federal government had overstepped its bounds and that the Act was, in their opinion, not constitutional. In this brief, we break down what the ruling said, what the court's justification was, what the implications are for resource development in Canada, and what steps come next.

To be clear, this case was not about the need for a robust impact assessment process to determine environmental, social, economic and health impacts of proposed projects. That need was unanimously recognized by the court, all four governments involved, and all intervenors. Rather, this case hinged on who has the authority to conduct impact assessments for projects entirely within a province: the federal or the provincial government.

What was this court case about?

At its heart, this case was about federalism and whether Parliament overstepped the limits of its constitutional mandate.

As the Court said in its decision, "federalism is a foundational principle of Canada's constitutional architecture." The Constitution grants responsibility and authority to the federal and provincial levels of government. The federal government is given jurisdiction in areas such as coastal and inland fisheries; international treaties; and trade and commerce. The provinces hold jurisdiction in matters relating to natural resources, public lands, electricity production and local economy.

But there are grey areas. The Constitution does not assign responsibility for the environment to either level of government. Instead, court decisions[1] have determined it is a shared responsibility—or more specifically, "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty." And impact assessments are part of this unassigned responsibility.

The *Impact Assessment Act* (introduced as Bill C-69) was enacted in 2019 and replaced the former *Canadian Environmental Assessment Act* (CEAA 2012) as well as the *National Energy Board Act*. The new Act brought in:[2]

- Changes to the process of project application and review,
- Changes in the factors to be considered in decision-making, and
- Changes in what projects would be reviewed under the Act.

This court case primarily relates to the last of these points. While some projects that fall under the Act are clearly under federal jurisdiction (e.g., works in national parks, nuclear projects, interprovincial or international power transmission lines), others are "designated projects"—that is, projects that would normally fall entirely under provincial jurisdiction but that the Act designated for review and approval by the federal government instead.

The federal government's justification for including these designated projects was that the scope and scale of some environmental impacts was of sufficient national concern that they should be declared to be federal impacts. The challenge brought by the government of Alberta (and supported by the governments of Saskatchewan and Ontario) was that the federal government could not unilaterally make this declaration for projects under the responsibility of provinces.

What did the Alberta Court of Appeal decide?

The justices (four out of five, with one dissenting) found that Parliament had acted beyond its authority in establishing the *Impact Assessment Act*. Some of the key elements of their decision were:

a) Parliament isn't entitled to require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction. They found the Act to be "a breath-taking pre-emption of provincial legislative authority."

b) Just because an intra-provincial project may have adverse effects on one or more areas that fall under federal authority (such as fisheries), this does not give the federal government jurisdiction to regulate the project itself from beginning to end. Parliament's jurisdiction is limited to the environmental effects of that activity on the area (or "head of power") in which the federal government has authority.

c) Simply having environmental effects is not sufficient to put a project into the federal government's authority for approval. As noted above, environment is a shared area and not the sole domain of the federal government. The court further noted that the logical extension would be that every project of every type everywhere in Canada would come under the Act, because there is no project or activity that doesn't have some effect on the environment. Parliament retains the authority to legislate to protect the environment, but must do so in accordance with the Constitution.

d) The Court felt the government had over-reached in its definition of a "federal adverse effect," saying "while those changes or impacts may be 'effects within federal jurisdiction' for **purposes of the Act**, that does not make all of them effects within federal jurisdiction **for purposes of the division of powers**" [emphasis in the original]. In other words, the government assigned itself powers under the Act that are not upheld by the constitutional division of power.

[1] Especially *Friends of the Oldman River Society v Canada, 2002*

[2] For more detail on these changes, see CWF's previous reports, including Bill C-69: We can get this right and Bill C-69: We lose the jurisprudence, we start back at Square One

As noted above, one of the five justices disagreed and wrote a dissenting opinion. That opinion emphasized the "shared responsibility" aspect of the environment and noted a body of case law that supports the opinion that federal legislation can apply to natural resource development without undermining provincial jurisdiction. The justice made a plea for "co-operative, interlocking environmental protection regimes among multiple jurisdictions, each functioning at its highest and best within their constitutional jurisdiction."

Why didn't the court just recommend removing problematic elements from the Act?

One place that the federal government and the Alberta court agreed is that the Act is non-severable. That is, it is not possible to just strike out certain elements of it; rather, the whole Act needs to stand, or the whole thing needs to fall. The problem didn't just lie with the inclusion of intra-provincial projects on the designated projects list – it was that the federal government had handed itself broad powers that were interwoven throughout the document and couldn't be disentangled.

What happens next?

Immediately—nothing. The Alberta court's ruling isn't binding on any party and so doesn't have any immediate effect. The federal government, however, has already indicated that it will challenge this ruling in the Supreme Court to reach a definitive judgement. How long that will take is anyone's guess at this point.

However, until this matter is resolved it will likely put a damper on investment in major projects in Canada. Unfortunately, where jurisdictional boundaries are not clear, it is the role of the courts or changes to the Constitution to set them. Both approaches take time, and unfortunately the extended saga increases both uncertainty and the length of time it may take projects to receive approval. Certainly not helpful for investment today, but necessary.

Conclusion

Balancing unity and diversity is the existential problem of confederation. Unity is about common goals and shared collective action, but it also creates problems when one size does not fit all. Diversity drives local solutions that fit the context, but at the cost of creating a patchwork of inconsistent approaches that may not be held to the same standards. Collaboration is the effort to capture the best of both worlds, furthering pan-Canadian objectives, while also addressing the needs and interests of individual provinces and territories.[3]

There is no lack of commitment to environmental protection by governments in Canada. But that goal is often lost in debates over who should do what. In the environmental policy arena, we have seen a shift from provincial leadership to federal-provincial cooperation, to unilateral action and finally ongoing battles over jurisdiction and policy implementation. These battles are a problem. Agreeing on goals is not enough. Jurisdictional wrangling over policies, planning, information for decision making, and implementation hampers the achievement of environmental and economic goals. As a result, efforts by all orders of government, have been bogged down by policy reversals, lack of transparency, power conflicts and a lack of trust – a state characterized as a lack of cooperation and collaboration. The desire of both orders of government to legislate in this area has "invariably led to disputes, uncertainty and judicial intervention."[4] And public trust is low. A 2019 study found that between 30% and 40% of Canadians across the country trusted the competence of *either* order of government and only about 20% trusted their integrity.[5]

We need both federal and provincial governments to recognize their common goals and to work as collaborators. The provinces and the federal government each have an important role to play in helping us achieve sustainability, prosperity and reconciliation—as do municipal governments, the private sector, NGOs . . . and public policy think tanks.

[3] R. Schertzer, A. McDougall, and G. Skogstad, Collaboration and Unilateral Action: Recent Intergovernmental Relations in Canada. IRPP Study, No.62, December 2016.

[4] N. Effendi, L.M. Wagner, L. Daniel and B. Carlson, *Canada: Clearing The Air: Supreme Court Upholds Federal Carbon Pricing Regime*, Border, Ladner, Gervais. March 2021.

[5] S. Kitt, J. Axsen, S. Long, E. Rhodes, (2021), "The role of trust in citizen acceptance of climate policy: Comparing perceptions of government competence, integrity and value similarity", Ecological Economics, 183 (2021) 106958.