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EARPGO to CEAA 2012

EARPGO

1984 - Canada's first "formal" federal environmental assessment regime

- Applied where there was federal decision-making authority in respect of a physical activity
- *Friends of the Oldman River Society v Canada*
- Triggered where there was an "affirmative regulatory duty"
- The environment is a "constitutionally abstruse matter"
- Environmental legislation must be linked to a head of power
- EARPGO was information-gathering process to inform decision-making under valid federal legislation
- The "Trojan Horse"?

CEAA 1992

CEAA 1992 (1995). Do I need a permit?

- Built on the “affirmative regulatory duty framework”
- “Section 5” trigger / *Law List Regulations*
- Screening to comprehensive study
- No prohibition on physical activities
- “Scoping to Trigger”: *Tolko, Sunpine and TrueNorth*

CEAA 2012

2012 – Is my project on the list?

- Fundamental shift in the structure of the legislation
- "Project List" trigger
- Legislated timelines
- Prohibition on carrying out physical activities associated with a designated project that may cause "environmental effects" (e.g., impacts to fish and fish habitat, migratory birds, interprovincial effects, Indigenous traditional land use)
- Threshold of "significant adverse effects"
- Political decision (GIC) on whether such effects are "justified in the circumstances"

The *Impact Assessment Act*

IAA

2019 – CEAA 2012 on steroids

- Project list structure maintained
- “Early planning phase” added (which has carried on for years in some cases)
- “Effects within federal jurisdiction” tied to section 7 prohibition
- Larger list of factors to be considered in an impact assessment
- “Public interest test” includes consideration of designated project’s contribution to sustainability and climate change factors
- A negative public interest decision stops a project as a whole

Reference re Impact Assessment Act

IAA at the SCC

2023 – *Oldman River 2.0?* Not so fast

- 5 to 2 majority opinion that all but 10 (non-controversial) sections of the IAA were unconstitutional.
- The “designated projects” scheme under the IAA was unconstitutional for two fundamental reasons:
- 1. scheme not directed at regulating “effects within federal jurisdiction” as defined in the IAA because these effects do not drive decision-making; and
- 2. the defined term “effects within federal jurisdiction” does not align with federal legislative jurisdiction.
- *“…untrammeled power to regulate projects qua projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety…”*

The Amendments

The Amendments

2024 – Botched surgery?

- Materiality thresholds: “non-negligible adverse” effects; “likely to be, to some extent, significant and, if so, the extent to which those effects are signficant”
- Same old section 7 prohibition?
- Adverse non-federal effects still up for grabs?
- Retreat on regulating GHG emissions

The Amendments

Missed Opportunity

- Unfortunate constitutional question mark hangs over the IAA if amended as proposed = uncertainty
- Even if constitutional, significant risk of being implemented in an unconstitutional manner = uncertainty
- Regulatory and litigations risks remain high = uncertainty
- Missed opportunity to bring much needed jurisdictional and regulatory certainty to major project review processes and to promote investment in Canada

The way forward

Where to now?

2024 and beyond

- Staying within the constitutional guardrails
- Time to bring back the decision trigger?
- Scoping to trigger
- “Comprehensive” versus “restricted” jurisdiction in practice
- Let’s talk – cooperation, coordination and consultation amongst jurisdictions is critical