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Supreme Court majority rules against federal environmental impact law

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The Supreme Court of Canada ruled Friday against federal legislation on the environmental effects of major developments, with five out of seven judges finding most of it unconstitutional because its language could be used to regulate activities within provincial jurisdiction.

Chief Justice Richard Wagner, writing for the majority, said the law as written could regulate activities that are provincial business, instead of restricting Ottawa to environmental effects that are within its power to oversee.

“Even if this court were to accept Canada's submission that the defined 'effects within federal jurisdiction'are within federal jurisdiction, these effects do not drive the scheme's decision-making powers,"he wrote in the 204-page opinion.

Wagner went on to say that the effects considered in the legislation previously known as Bill C-69, which included a range of environmental and social factors as well as climate change, were “overbroad."

“It is difficult to envision a proposed major project in Canada that would not involve any of the activities that 'may'cause at least one of the enumerated effects,'he wrote.

“The scheme invites the federal government to make decisions in respect of projects that it has no jurisdiction to regulate.”

Still, Wagner wrote that Ottawa has a large and legitimate role over environmental issues and that provinces must work within its rules.

“The fact that a project involves activities primarily regulated by provincial legislatures does not create an enclave of exclusivity. Even a 'provincial'project may cause effects in respect of which the federal government can properly legislate."

Two judges dissented, saying the law was constitutional.

Alberta Premier Danielle Smith, whose province challenged the legislation, called it a “massive win"for provincial rights. She said it gives “exclusive provincial jurisdiction"to matters such as building new greenhouse gas-emitting natural gas power plants.

“That's our exclusive right, to be able to make decisions on being able to permit and approve those types of projects,"she said.

“Where they went so wrong is they presumed to step into our jurisdiction to make decisions that fall completely, 100 per cent, within Alberta's borders. They should stop trying to micromanage our affairs."

Ontario Premier Doug Ford suggested the opinion will remove Ottawa from project assessment. “We welcome today's decision that confirms what we've been saying all along,"he said in a statement. “The federal impact assessment process needlessly duplicated Ontario's rigorous and world-leading environmental assessment requirements."

Ford's Saskatchewan counterpart, Scott Moe, said on social media the decision should be a warning shot across the federal bow.

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“This should cause the federal government to rethink the many other areas where it is overstepping its constitutional competence, like electrical generation and oil and gas production."

However, Federal Environment Minister Steven Guilbeault said the court's opinion doesn't strike down the law and won't change how federal assessments have been conducted. He said the government has been cautious in applying the law.

“When applying this act, we have tried to ensure we stayed within federal heads of power. We will certainly continue to do that,"he said.

“What the Supreme Court seems to suggest is that the act is too broad in certain respects and we need to tighten that. We will work to do that in the coming months.”

Guilbeault said it's too early to suggest what needs to change.

“The Supreme Court did indicate that the notion of public interest would benefit from being further defined."Federal Natural Resources Minister Jonathan Wilkinson suggested those changes can be made quickly.

“The concerns raised by the Supreme Court can be dealt with in a relatively surgical way,"he said. “We all have an interest in finding ways to move this forward expeditiously.”

Stewart Elgie, law professor and head of the University of Ottawa's Environment Institute, said the court's opinion doesn't strip Ottawa of its ability to regulate greenhouse gases or a wide variety of other environmental effects from health to habitat — they just have to be linked more closely to federal powers.

“The federal government still has really broad authority to regulate projects through environmental assessment,"he said. “It just doesn't have unlimited authority.

“(The government) needs to tighten the act up to reflect how the federal government actually does environmental assessment."

Enacted in 2019, the law lists activities that would trigger a federal impact review.

Alberta opposed it, arguing the law gives Ottawa power to stick its nose into provincial matters such as resource development. In 2022, it asked the Alberta Court of Appeal for a legal opinion.

The Appeal Court, in its strongly worded opinion, called the law an “existential threat"to the division of powers in the Constitution and a “wrecking ball"on the rights of Alberta and Saskatchewan.

The Impact Assessment Act is now the second such piece of legislation to be ruled unconstitutional.

In 2016, the Federal Court of Appeal struck down assessment legislation passed by the Conservative government of Stephen Harper.

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