Intelligence MEMOS

From: Grant Sprague

To: Canada's Governments

Date: November 6, 2023

Re: THE SUPREME COURT WAS CLEAR: GOVERNMENTS NEED TO ALIGN ON GREEN AGENDA

Four years ago, the federal government enacted the *Impact Assessment Act* (IAA), also known as Bill C-69. The reception was not good.

In some circles, the legislation became known as the "no-more pipelines bill." Industry associations, scholars and governments expressed their misgivings with the act and the effects it was likely to have on resource development. And now the Supreme Court of Canada confirmed the act is unconstitutional. Whoops!

The door is not shut on a better approach, however. But Ottawa and the provinces need to work together to achieve it, starting now. In the decision's conclusion, Chief Justice Wagner wrote: "This scheme plainly overstepped the mark." What are the key elements that federal policy-makers need to take away from this decision?

First, the "environment" is not a shared jurisdiction affording each order of government the unfettered ability to legislate and regulate activity. As the court majority wrote, "this court has … affirmed that each level of government must confine its legislative efforts to its own constitutional sphere." Each government has the authority to legislate and regulate in those areas that are ascribed to it but not in all elements of "the environment." The phrase "stay in your lane" has been much heard, and applies to both federal and provincial jurisdictions.

Second, the court inherently reaffirms that there is no hierarchy between the federal and provincial governments. The federal government is not a supervisor of provinces nor vice versa. This fundamental piece of civics needs to be reinforced. Commentators often are in favour of "oversight" or the engagement of the other order of government, presumably because they perceive the other order as being more aligned with their world view.

But, to be blunt, simply because a federal government believes a topic is important does not give it jurisdiction to act. Climate change is the latest example. The IAA effectively inserted federal decision-making power if a project might impact federal climate objectives. The federal government can promise whatever it wants. But can it actually regulate and deliver? The answer is nearly always "no." Ottawa needs the co-operation of the provinces as the means of achieving outcomes that are nearly always in provincial jurisdiction.

Third, it is likely that many projects will span the jurisdiction of both the federal and provincial governments. While this is not a new phenomenon itself, a real challenge of the IAA was its elevation of environment assessment legislation into federal "super-regulatory" legislation. Effectively, the legislation permitted the federal government, through its assessment process, to become the perpetual regulator of potential projects.

The legislation's breadth was therefore enormous. As the court noted, the factors to be considered in the process prescribed in the act encompass all environmental, social and economic benefits, not just those within federal jurisdiction.

To gain a real sense of how this legislation is in fact being used, examine the 50 or so projects currently on the federal **register**. The list runs from an offshore wind project to rare-earth mining projects to all-season roads on provincial lands. This careening by the act into areas of dubious federal jurisdiction was one of the greatest concerns critics had.

Finally, the court stated: "Through respect for the division of powers in Canada's constitutional structure, both levels of government can exercise leadership in environmental protection and ensure the continued health of our shared environment." This is not new advice. Indeed, it has been the courts' advice for the past 30 years or so.

Co-operation and collaboration with another order of government that has valid areas of jurisdiction needs to begin at the beginning and not at the end. A drive-by consultation is unlikely to actually achieve the federal government's goals. Yet it appears Ottawa plans to barrel ahead on its own. Energy and Natural Resources Minister Jonathan Wilkinson has indicated that perhaps some surgical amendments are needed. Environment Minister Steven Guilbeault has indicated matters can be resolved quickly. Both appear to be of the view that the federal government alone can remedy the act's deficiencies. But that's the very opposite of what the court said.

Before C-69, the federal government had legislation to ensure environmental matters were considered in its own decision-making within its own jurisdiction. Similarly, provinces had and still have their own legislation to exercise their jurisdiction. If a federal government wants to restore some certainty and act quickly, one choice would be to simply excise the unconstitutional elements of the legislation and be content with a purely federal process for areas of federal jurisdiction.

Grant Sprague was a deputy minister in the Government of Alberta and is a senior fellow of the C.D. Howe Institute. In 2019 he co-authored the Howe report, "A Crisis of our Own Making: Prospects for Major Natural Resource Projects in Canada."

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