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# Amendments to Impact Assessment Act released – triage or major surgery?

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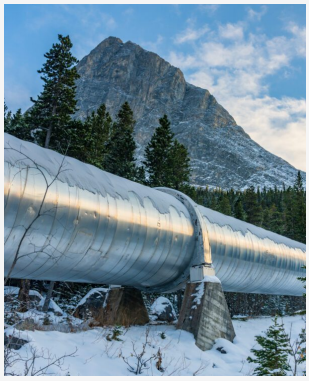

## Related Expertise

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Draft amendments to the federal *Impact Assessment Act* (the IAA or the Act) were released on Tuesday, April 30, 2024, as part of a Notice of Ways and Means Motion [PDF] previewing implementation of the 2024 federal budget. The amendments are intended to update Canada's federal environmental impact assessment regime to respond to the October 2023 reference opinion of the Supreme Court of Canada (SCC), in which the majority found the IAA largely unconstitutional (*IAA Reference*).[1] We have prepared an unofficial comparison version [PDF] of the IAA as modified by the proposed amendments for your convenience.

The amendments are "relatively surgical" (to use the Minister's terminology shortly after the release of the *IAA Reference*).[2] The 32 proposed amendments do the minimum to address the most significant concerns identified by the SCC. Most notably, the amendments

1. revise the unconstitutionally overbroad definition of "effects within federal jurisdiction," which impacts key decisions under the Act
2. impose new constraints on screening decisions
3. restructure the Act's final decision-making procedure
4. increase opportunities for cooperation with assessments led by other jurisdictions

Below, we discuss these proposed changes and the extent to which they address the Court's concerns.

Proponents of projects potentially subject to the IAA should be aware of the following:

- The amendments have not come into force and do not have legal effect; further development and changes may be forthcoming.
- The essential procedures, timelines and authorities in the IAA would remain unaltered by the amendments.
- The amendments include transitional provisions that would enable retroactive application to designated projects currently undergoing assessment under the IAA.

## 1. Changes to the scope of 'effects within federal jurisdiction'

Under the current Act, the broadly defined term "effects within federal jurisdiction" appears 16 times and interacts with consequential provisions, including the Minister's discretionary power to designate projects for federal impact assessment under section 9, Agency screening decisions regarding whether to proceed with an assessment under section 16 and the factors that must be taken into consideration in the Minister's or Cabinet's public interest determination under section 60 or 62. A parallel definition also governs the Act's section 7 prohibition against a proponent taking any action in connection with a designated project that may cause the enumerated effects, which is backed by significant penalties. The majority opinion in the *IAA Reference* found that the existing definition of "effects within federal jurisdiction" goes far beyond federal legislative jurisdiction under section 91 of the *Constitution Act, 1867*,[3] and that the overbreadth "exacerbates the constitutional frailties of the scheme's decision-making functions."[4]

The amendments would replace the existing definition of "effects within federal jurisdiction" with a revised definition for "adverse effects within federal jurisdiction." The definition of "adverse effects within federal jurisdiction" would also limit the IAA's section 7 prohibition, which the majority in the *IAA Reference* found imposes an indefinite prohibition on acts that may cause trivial and non-adverse impacts.[5] The new definition would largely continue the existing definition's list of five kinds of changes or impacts caused by a physical activity or designated project (which include changes to fish and fish habitat, changes on federal lands and changes affecting the Indigenous peoples of Canada), but with two notable changes.

First, the new definition would apply to "non-negligible adverse" effects or changes, rather than the existing definition which applies to any of the listed changes or impacts, positive or negative, regardless of materiality. The existing definition of "direct or incidental effects," which refers to effects directly linked or necessarily incidental to federal decisions, would receive similar amendments focusing the definition on "non-negligible adverse effects." While the changes introduce some degree of materiality where such effects are used as a trigger for impact assessment or as justification for denying a proposal or imposing conditions, it remains unclear whether merely "non-negligible" impacts, as opposed to the "significant adverse effects" relied upon in previous federal environmental impact legislation,[6] would be sufficient to link such decisions to federal jurisdiction. Use of ambiguous language such "non-negligible adverse effect" would also continue to create significant uncertainty in determining under what circumstances a designated project will trigger federal assessment or what factors may permissibly influence key decisions.

Second, the new definition would remove the existing definition's broad application to any type of extra-provincial effects resulting from a designated project, limiting consideration of extra-provincial effects (other than effects occurring on federal lands) to non-negligible adverse changes that are caused by pollution that affects boundary waters, international waters, interprovincial waters or the marine environment outside of Canada. This narrowed focus on extra-provincial water pollution would appear to rely on the Supreme Court's finding of federal jurisdiction over extra-provincial water pollution in *R. v. Crown Zellerbach*,[7] although it is unclear whether the scope of the defined jurisdiction fully aligns with the jurisdiction described in the Court's reasons in that case. Importantly, this definition would no longer apply to extra-provincial effects of greenhouse gas emissions or other air pollution, and would no longer permit decision-makers to trigger assessments or impose condition on projects based solely on a project's emissions.

The new definition would also create what is effectively a second definition applicable to projects that are carried out on federal lands or a federal work or undertaking as defined in

the *Canadian Environmental Protection Act, 1999*.[8] "Adverse effects within federal jurisdiction" for these federally regulated projects would include *any* kind of non-negligible adverse change or effect, and is not limited to the changes or effects specifically enumerated in the above definition.

The *IAA Reference* makes clear that addressing the overbreadth of self-defined "effects within federal jurisdiction" is not, by itself, sufficient to render the IAA constitutional. In addition to the issue of overbreadth, which would arguably remain despite the above changes, the majority found that the definition did not sufficiently focus core decision-making functions on matters of federal jurisdiction. Further changes introduced by the amendments purport to address these concerns in part, but the extent to which they succeed is also open to debate.

## 2. New constraints on screening decisions

Under the current Act, the decision over whether to require a project to undergo federal assessment must take into account factors enumerated at section 16 but remains subject to the otherwise unfettered discretion of the Impact Assessment Agency of Canada. The amendments would add an additional constraint on this discretion by requiring that the Agency conduct an impact assessment "only if it is satisfied that the carrying out of the designated project may cause adverse effects within federal jurisdiction or incidental adverse effects." This may significantly limit the Agency's ability to compel assessment of a project where the proponent can avoid mitigate adverse effects within federal jurisdiction — for example, through alterations to project design that would avoid harmful alteration, disturbance or destruction of fish habitat.

The amendments would also remove the mandatory requirement for proponents to submit detailed project descriptions, which inform a screening decision following an initial planning phase. A proponent must still provide notice of how it intends to address issues identified during the planning phase, but under a revised section 15(1.1), a detailed project description will only be required where the Agency is of the opinion that a screening decision cannot be made without one. This change would streamline the screening process for projects that do not require detailed project descriptions. However, as the Agency has discretion over this decision, this may also create uncertainty for project proponents regarding the process and timing that will apply to new proposed projects.

Before directing a designated project to a full federal assessment, pursuant to an additional paragraph 16(2)(f.1) the Agency would be required to consider

whether a means other than an impact assessment exists that would permit a jurisdiction to address the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that may be caused by the carrying out of the physical activity.

Under similar amendments to section 9, the Minister may also consider this factor when deciding whether to designate a project that is not listed in the *Physical Activities Regulations* for federal assessment. "Jurisdiction" includes other federal authorities and agencies as well as Indigenous and provincial governments, which can address adverse effects (within federal jurisdiction) identified in the planning phase. This would reinstate a longstanding principle that an environmental impact assessment should be incremental to existing processes. However, the Minister's consideration of duplicative regulatory processes in section 9 would remain discretionary, meaning that the practical effect of this amendment will depend on how the Minister administers the Act.

## 3. Changes to final decision-making framework

Under the current IAA, final decision-making concerning whether to allow a designated project to proceed, and under what circumstances, is subject to a public interest determination by the Minister of Environment under section 60 (in the case of a standard review), or the Governor in Council under section 62 (in the case of a panel review or a referral from the Minister). This results in a single decision by either decision-maker as to whether the adverse effects within federal jurisdiction are in the public interest in light of factors listed at section 63.

The amendments would replace this with a two-part decision-making framework in which either decision-maker must first determine whether, after taking into account mitigation measures, the adverse effects within federal jurisdiction and the direct or incidental adverse effects described in the impact assessment report are "likely to be, to some extent, significant and, if so, the extent to which those effects are significant". If significant effects are identified, the decision-maker must then determine whether these effects are "justified in the public interest" in light of the extent of their significance and the factors listed at section 63. These factors would remain largely the same with the amendments, although reorganized and with revised language that purports to focus decision-making more on the *effects* of a project rather than assessment of the *project itself*.[9]

This two-part decision-making framework recalls the framework used in the IAA's predecessor legislation. But unlike the *Canadian Environmental Assessment Act, 2012*, the amended Act would assign both steps of the decision to a single decision-maker and replace a determination of whether the adverse effects were "justified in the circumstances" with a cost-benefit analysis against public interest as defined, in part, at section 63.[10] It remains debatable whether these revisions differ meaningfully in their practical and legal effect from the single, highly politicized public interest determination under the current legislation.

## 4. Additional opportunities for cooperation

The amendments would create an expanded role for agreements with provinces and other jurisdictions for the purposes of coordinating environmental assessments. Revisions to sections 31 and 32 would allow, in addition to full substitution of provincial assessment processes for a federal impact assessment, for partial substitution accompanied by a cooperation agreement to ensure federal aspects of a project's impacts are assessed in the provincial process. While these provisions have the potential to enable more reliance on processes led by local jurisdictions, including the provinces and Indigenous governments, implementation and certainty for proponents will depend on the extent to which federal authorities can reach agreements regarding the scope and procedure for impact assessments.

## Conclusions

The amendments triage major deficiencies identified by the SCC under the existing Act, but it is uncertain whether they will result in meaningful changes to how the current Act has been administered. We expect the federal government will continue to engage in consultation on the proposed amendments, which may result in further changes. If finalized in their current form, however, we expect the amended Act may again be challenged by the provinces as being unconstitutional. In our view, the amendments also fail to address the criticisms from project proponents that the current IAA deters investment in new projects because its applicability, timelines and decision-making powers are uncertain and unpredictable.

*Special thanks to Osler articling student Tyler Warchola, who assisted with this post.*

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[1] *Reference re Impact Assessment Act*, 2023 SCC 23. Osler previously commented on the *IAA Reference* at the time of its release.

[2] See, e.g.: "Supreme Court's Impact Assessment Act ruling not a repudiation of federal power over climate protection, MPs and experts say, but urgent fix needed for law," *Hill Times*, October 23, 2023.

[3] *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 179.

[4] *Reference re Impact Assessment Act*, 2023 SCC 23, at paras. 6, 136, 179.

[5] *Reference re Impact Assessment Act*, 2023 SCC 23, at paras. 190–203.

[6] *Canadian Environmental Assessment Act, 2012*, SC 2012, c. 19, s. 52, ss. 31(1), 38(1); *Canadian Environmental Assessment Act*, SC 1992, c. 37, ss. 20, 23, 37.

[7] *R. v. Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC).

[8] *Canadian Environmental Protection Act, 1999*, SC 1999, c. 33, s. 3(1).

[9] Where currently section 63 refers to, for example, the extent to which the project itself contributes to or hinders sustainability or Canada's ability to meet its climate change commitments, the amendments add a focus on whether the "effects of the project" result in the same contributions or hindrances. These changes appear to be intended to address findings in the *IAA Reference* that the Act regulates the project as a project, rather than maintaining a constitutionally permissible focus on federal effects. It is questionable whether this slight change in language amounts to meaningful change in the nature of the overall public interest determination.

[10] Under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c. 19, the Minister or a Responsible Authority decided whether a project was likely to cause significant adverse environmental effects as defined at section 5; if the decision found affirmatively, the decision of whether the effects were "justified in the circumstances" was referred to the Governor in Council."