

Federal Government Narrows the Application of the Impact Assessment Act

Jeremy Barretto, Arend J.A. Hoekstra, Dana Poscente

May 1, 2024

Six months ago, on October 13, 2023, a Supreme Court of Canada (SCC) majority concluded that the federal *Impact Assessment Act*¹ was largely unconstitutional in its *Reference re Impact Assessment Act* (IAA Reference).²

On April 30, 2024, the Government of Canada published its highly anticipated proposed amendments to the *Impact Assessment Act* to address the IAA Reference, as part of draft legislation to implement the 2024 federal budget.³

In the proposed amendments, the Government of Canada re-focused the *Impact Assessment Act* on adverse effects within federal jurisdiction. Parliament, and potentially courts, will consider whether the amendments went far enough to address the SCC's constitutionality concerns.

ANALYSIS OF PROPOSED AMENDMENTS

Below we analyze key amendments to the *Impact Assessment Act* to address the SCC's comments in the IAA Reference.

Narrowing the Scope of Impacts to Adverse Effects Within Federal Jurisdiction

Canada proposes repealing the previous definition of "effects within federal jurisdiction," and replacing it with a new defined term "adverse effects within federal jurisdiction."⁴ The new definition narrows the scope of impacts that can trigger obligations under the *Impact Assessment Act*, removes effects in a province other than the one where the project is carried out, and liberally adds the phrase "non-negligible" to qualify that the effects must satisfy a materiality threshold. This new defined term directly responds to the SCC's accusation that the term was previously defined too broadly and allowed federal decision makers to step into areas of provincial jurisdiction.⁵

The SCC took issue with the possibility under the *Impact Assessment Act* that the Government of Canada could require an impact assessment for, or regulate an entire project, with negligible, or even positive, effects within federal jurisdiction as defined in the Act.⁶ The SCC commented that the text of the *Impact Assessment Act* "gives no primacy to the possibility of adverse effects relative to the other mandatory

Cassels

considerations,”⁷ and that there is a risk that “projects with little or no potential for adverse federal effects will nonetheless be required to undergo an impact assessment.”⁸ As well, the SCC majority found that the blanket prohibition on carrying out a project until the impact assessment process ends effectively “prohibits causing any **positive or negative** changes or impacts of any magnitude” (emphasis added).⁹ The proposed amendments, by adding the language of “adverse” and “non-negligible,” attempt to address both these concerns by limiting the Government of Canada’s jurisdiction under the *Impact Assessment Act* to only projects that cause material and adverse effects. Further, at the screening decision stage the proposed amendments add a section which states that an impact assessment may only be required if the Agency is satisfied it may cause adverse effects within federal jurisdiction.¹⁰

Preserving the Project List

Projects come under the ambit of the *Impact Assessment Act* in much the same way as before: the *Physical Activities Regulations* (Project List) is carried through in the amendments,¹¹ as is the Minister’s discretion to designate a project on request or through the Minister’s own initiative.¹² The SCC did not recommend changes to the designation process, finding that it is an information-gathering phase and properly precautionary.¹³

The Project List is unchanged, and deems certain physical activities as “designated activities” that, in Cabinet’s opinion, may cause adverse effects within federal jurisdiction or direct or incidental adverse effects. During the creation of the *Impact Assessment Act*, the Project List was considered important by industry to provide more certainty regarding whether a federal impact assessment is triggered.

It appears that the Government of Canada is attempting to preserve the structure of the *Impact Assessment Act* by focusing it on adverse effects within federal jurisdiction. Proposed projects that are designated by inclusion on the Project List may not require a full impact assessment. A challenge moving forward will be for federal decision makers to limit impact assessment processes accordingly.

Decision Making Processes Largely Maintained

The factors that a reviewing body must consider when conducting an impact assessment remain unchanged under the proposed amendments, which is consistent with the SCC’s finding that these factors are unproblematic.¹⁴

Under the proposed amendments, a federal impact assessment still culminates in a determination by the Minister or Governor in Council about the likely effects of the project, and whether those effects are in the public interest.¹⁵ The IAA Reference found that the mandatory factors at this public interest determination overstepped federal legislative competence, and allowed the Government of Canada to deny a project as a whole rather than only based on its effects within federal jurisdiction.¹⁶ The revisions to this section are light, likely allowing the new definition of “adverse effects within federal jurisdiction” to do the work of keeping the

Cassels

public interest decision within the constitutional limits of the federal government's jurisdiction.

The proposed amendments also purport to increase coordination of impact assessments between jurisdictions such as provinces and Indigenous governments, and to increase efficiency and certainty for proponents and investors.¹⁷ The proposed amendments add some language in the *Impact Assessment Act* around cooperating with other jurisdictions, but it remains unclear how such cooperation will be enhanced in practice.

The federal lands scheme of the *Impact Assessment Act* remains unchanged,¹⁸ as do regional assessments and strategic assessments.¹⁹

IMPLICATIONS

Following the IAA Reference, the Government of Canada could have overhauled the *Impact Assessment Act* to change its structure from consideration of designated projects with a Project List to the system that previously existed under the *Canadian Environmental Assessment Act, 1992*²⁰ to focus on federal decision-making triggers. Instead, Canada has proposed comparatively minor amendments to narrow the application of the *Impact Assessment Act* to only adverse effects within federal jurisdiction, while maintaining the Project List. This approach is reasonable to maintain the overall architecture of the *Impact Assessment Act* while responding to the SCC decision. However, challenges may be ahead in impact assessments where the Government of Canada has previously taken a broad role in evaluating a project across a variety of public, environmental, and Indigenous considerations. Now, federal decision makers will need to limit their project review processes to only those adverse effects under federal jurisdiction. This transition can be challenging for federal decision makers who need to transition to a more limited role in impact assessments, particularly where there is also a provincial assessment.

JOIN US!

Join experts from our Regulatory and Aboriginal Law Groups on Tuesday, May 14, 2024, for a Case Law Update as they provide an overview of recent trends along with pragmatic and contextualized insights on a variety of critical topics including the IAA Reference and recent proposed amendments. [Contact us for more information.](#)

¹ *Impact Assessment Act*, [SC 2019, c 28, s 1](#) [IAA].

Cassels

² *Reference re Impact Assessment Act*, [2023 SCC 23](#) [IAA Reference]. See our legal update regarding the SCC decision in the IAA Reference [here](#).

³ *Notice of Ways and Means Motion to introduce an Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*, published by the Honourable Chrystia Freeland, Deputy Prime Minister and Minister of Finance (April 29 2024) – [online](#) [NWMM].

⁴ NWMM, s 271.

⁵ IAA Reference, paras 136, 179-203, and see para 193: “Had Parliament intended the ‘designated projects’ scheme to target only ‘significant’ changes, it could have similarly used that adjective in defining ‘effects within federal jurisdiction’. It did not do so.”

⁶ IAA Reference, para 154, 178.

⁷ IAA Reference, para 152.

⁸ IAA Reference, para 154.

⁹ IAA Reference, para 193, and see para 95.

¹⁰ NWMM, s 277(3).

¹¹ NWMM, s 316.

¹² NWMM, s 275.

¹³ IAA Reference, para 146.

¹⁴ IAA, s 22; IAA Reference, para 161.

¹⁵ NWMM, s 291; IAA, s 63.

¹⁶ IAA Reference, paras 167-168.

¹⁷ Government of Canada, Budget 2024, p 191-193 - [online](#).

¹⁸ IAA, ss 81-91.

¹⁹ IAA, ss 92-95.

²⁰ *Canadian Environmental Assessment Act*, [SC 1992, c 37](#).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.