The Changing Environment Of Federal Impact Assessment

In a landmark constitutional reference released in late 2023 (IAA Reference), a majority of the Supreme Court of Canada found Canada's federal scheme for assessing and regulating major resource and infrastructure developments largely unconstitutional. The majority's opinion effectively mandated a rewrite of the *Impact Assessment Act* (IAA) in a manner that respects the constitutional division of powers between the provinces and federal government. It also invited Parliament and the provinces to seek "cooperative solutions" to restore harmony in the regulation of major projects.

In response, Parliament released [PDF] its amendments in April, which the Minister of Natural Resources noted were done in a "relatively surgical way", all of which have since come into force without amendment. Unfortunately, the revisions fall short of the "cooperative solutions" that a number of project proponents hoped would ensue following the IAA Reference. The amendments leave significant uncertainty regarding the regulatory framework. In October 2024, Alberta Premier Danielle Smith indicated [PDF] her government's intent to bring a new legal challenge to the IAA if a further 30 substantial amendments are not adopted. At time of publication, the Province has referred [PDF] the amended IAA to the Alberta Court of Appeal. Similar to the 2019 referral that culminated in the IAA Reference, the Province seeks an opinion as to whether the IAA and its regulations are beyond federal legislative authority. In this second

reference, Alberta also asks whether, in the alternative, the amended legislation can be read down as inapplicable to the extent that its application would impair provincial legislative power.

Uncertainty regarding future litigation is compounded by expectations of a federal election by October 2025. With a change in government appearing possible, if not likely, 2025 may see yet another rethinking of the federal government's role in regulating major resource and infrastructure developments. Interested parties should watch for engagement opportunities and ensure their concerns are heard as further legislative reform proceeds.

While the IAA regime remains in place, proponents of major intra-provincial projects should expect the federal government to play a more modest role in assessment and regulation of projects that are primarily provincially regulated. Proponents should be vigilant of federal overreach under the IAA.

For federally regulated undertakings such as nuclear, hydro, and offshore facilities, federal regulators have signaled a willingness to prove that the IAA can get major projects built on time. This is particularly the case for projects involving renewable resources and critical minerals. Opportunities may exist for cooperation as a chastised federal government seeks to prove it can establish "better rules."

Incremental changes to a problematic scheme

As amended, the IAA continues to prohibit the proponent of a designated project from taking any action that could cause "adverse effects within federal jurisdiction" unless and until the project undergoes an impact assessment, or is exempted by a screening decision. A revised definition of "adverse effects" has marginally narrowed the formerly expansive and problematic concept of "effects within federal jurisdiction."

To fall within the new definition, prohibited effects must now be both “adverse” and “non-negligible.” Moreover, the list of prohibited changes to the environment that can attract IAA review no longer includes the extra-provincial effects of greenhouse gas emissions or other air pollution. As a result, decision-makers can no longer trigger assessments or impose conditions on projects based solely on a project’s emissions.

The amended IAA further requires that an impact assessment may only proceed if the Impact Assessment Agency of Canada (IAAC) is satisfied that the designated project may cause adverse effects within federal jurisdiction. This change might limit the IAAC’s discretion to direct an impact assessment of a project that causes no material harm to fish, migratory birds, or other listed “adverse effects within federal jurisdiction.” Projects that mitigate impacts in this area may have grounds to successfully challenge agency screening decisions.

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From a practical perspective, however, it is unlikely these amendments will result in significant changes to how the IAA is administered by the IAAC, given the considerable discretion the legislation affords. Uncertainty will likely persist for proponents who are seeking clarity on whether a proposed project could cause a “non-negligible adverse change” to a variety of environmental matters within federal jurisdiction, including fish habitat, migratory birds, or to the social or economic conditions of the Indigenous peoples of Canada. It remains uncertain whether a project can be directed to a months- or years-long assessment process, or even be prohibited from proceeding in its entirety based on an incidental “non-negligible adverse change” in one of these areas. At the very least, a constitutional question mark continues to hang over the amended IAA.

Substantive changes to federal impact assessment likely

With further legal challenges looming, as well as a potential change in federal government by October 2025, the regulatory landscape remains uncertain for project proponents. If elected, the federal Conservative Party is likely to overhaul the IAA, inevitably leading to more substantive changes to the federal environmental assessment regime.

By way of example, among the specific changes [PDF] demanded by the Alberta Premier is the removal of the prohibition against proceeding with designated projects. This prohibition currently underpins the entire IAA regime. Instead, Premier Smith has requested that reviews be linked to circumstances where federal authorizations or decisions are required for designated projects. While these changes appear unlikely to be implemented under the current federal government, the concept is likely to feature prominently in further discussions about the future of federal environmental assessment.

Beyond its immediate impact on federal environmental assessment, the IAA Reference has also animated wider jurisdictional questions about federal legislative creep into areas of provincial jurisdiction under other federal environmental statutes. This can be seen in the appeal from last year's Federal Court ruling that the federal government's designation of plastic manufactured items as toxic substances that are subject to regulation under the *Canadian Environmental Protection Act* was unreasonable and unconstitutional.

Legal challenges to the Clean Electricity Regulations are also anticipated, also on the basis that they are outside federal legislative jurisdiction. The current regulations would mandate a net-zero emissions power grid across provinces by 2035.

Draft regulations released in late 2024 establishing a cap on greenhouse gas emissions for the oil and gas sector have drawn yet more fiery words from the Alberta Premier, and are all but certain to result in further constitutional litigation if passed.

Looking ahead to 2025 and beyond, continued legal uncertainty regarding the federal government's role in regulating intra-provincial infrastructure and resource development can be expected broadly. At the very least, the IAA Reference has affirmed that, except for federally regulated activities such as hydro and nuclear, the provinces are the primary authority responsible for assessing and approving new projects within their borders.

Well-established environmental impact assessment legislation exists in every Canadian province. Proponents should expect provincial policies and procedures will be at the forefront of assessment and approval processes. Federal involvement will be focused on mitigating impacts on specific areas of federal jurisdiction, such as fish and fish habitat, some transboundary impacts to water, and impacts to federal lands. If other federal or provincial processes already assess and deal with these impacts, a designation for federal assessment is open to legal challenge.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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