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Supreme Court of Canada Finds *Impact Assessment Act* Unconstitutional

Authors: [Sarah V. Powell](#), [Alexandria J. Pike](#), [Marie-Claude Bellemare](#) and [Zachary Silver](#)

On October 13, 2023, in a 5-2 split decision, the Supreme Court of Canada (SCC) found the federal *Impact Assessment Act* (IAA) to be, in part, unconstitutional in *Reference re Impact Assessment Act*. The SCC determined that the IAA's treatment of "designated projects" was unconstitutional, as the IAA allows for decisions to be made in respect of such projects on grounds that are not sufficiently connected to adverse federal effects.

Background

The Alberta government had brought a reference to the Court of Appeal of Alberta, which concluded that the IAA, and the associated *Physical Activities Regulations* (Project List), were unconstitutional in their entirety. According to the Court of Appeal of Alberta, the IAA impermissibly intrudes on provincial powers to legislate in respect of natural resources and property and civil rights in the province. The Attorney General of Canada appealed that decision.

The SCC stated that the IAA is "essentially two acts in one," with separate "schemes" to address (i) major projects that are designated pursuant to the Project List (Designated Projects) to be automatically subject to the IAA; and (ii) non-designated activities with the involvement of a federal authority (taking place on federal lands or outside of Canada). As discussed below, the SCC's decision concludes that only the IAA scheme with respect to Designated Projects is unconstitutional.

Finding of Unconstitutionality

While the SCC confirms that the federal government has the authority to enact impact assessment legislation, the SCC concluded that such federal legislation must be directed at the federal aspects of the projects to which such legislation relates to be constitutional. With regard to the IAA, the SCC found that two stages of the Designated Projects scheme were unconstitutional, as follows:

1. Several of the factors to be considered when making the preliminary screening decision regarding Designated Projects (under s. 16(2) of the IAA) are not, as they need to be, related to potential adverse federal effects. For example, the IAA allows for the screening of Designated Projects to be made on the basis of "any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted," regardless of whether such comments relate to potential adverse federal effects.
2. Similarly, the SCC concluded that the final stage of the IAA process for Designated Projects would allow for a public interest decision to be based on considerations that may have no connection to any adverse federal effects. For example, such public interest decision may be based on the extent to which a Designated Project contributes to sustainability, which the SCC characterized as encompassing all environmental, social and economic effects, rather than only those properly falling within federal jurisdiction.

While not determinative of the SCC's decision, the IAA's definition of "effects within federal jurisdiction" was also found to be overly broad, allowing the federal government to designate a project based on effects not falling within federal jurisdiction. For example, the IAA's definition of "effects within federal jurisdiction" includes a change to the environment in a province other than the one where the

Designated Project is being carried out, which would allow a project to be designated based solely on the fact that the project emits greenhouse gases that cross provincial borders.

On a related note, the SCC concluded that s.7 of the IAA subjects the proponent of a Designated Project to prohibitions that the federal government would not have jurisdiction to issue directly. More specifically, the SCC highlighted that s.7 of the IAA prohibits, among other things, a proponent from doing anything that may cause a change (not necessarily a negative change) to fish and fish habitat, whereas federal *Fisheries Act* jurisprudence has confirmed that conduct prohibited under that Act must be linked to actual or potential harm to fisheries.

While concluding that the decision mechanisms related to the screening and approval of Designated Projects were unconstitutional, the SCC found no fault with the designation mechanism through which the Project List is assembled, and confirmed that the federal government may (during the assessment phase) gather information about effects extending beyond those falling within federal jurisdiction.

Implications and Next Steps

The SCC's decision is a non-binding advisory opinion, leaving the IAA in force. In a press conference, the federal Ministers of Environment and Climate Change and of Energy and Natural Resources confirmed that the federal government accepts the SCC's findings, and that (i) the IAA is already administered in a manner that is consistent with the SCC's decision (suggesting that the decision will have no practical impact in relation to ongoing assessments); and (ii) instead of wholesale changes to the IAA, "surgical" legislative amendments will be drafted.

Proponents who have had Designated Projects rejected, or limited, under the IAA to date may wish to review those decisions to determine if any avenues of challenge are available to them. For Designated Projects that are currently undergoing assessments under the IAA, we can expect that such assessments will be reviewed by the Impact Assessment Agency to confirm jurisdictional scope. Proponents in the midst of the assessment process may wish to be proactive in requesting a review of the scope of the assessment.

One significant lesson that can be drawn from the SCC's decision is that the federal government must tread lightly in its efforts to use the IAA as a means to combat climate change (e.g., by basing decisions regarding Designated Projects on the extent of their greenhouse gas emissions). In that regard, the SCC went out of its way to confirm that the IAA cannot be used by the federal government as an indirect means to enact a comprehensive regulatory scheme in relation to greenhouse gas emissions—something that the SCC had concluded in *References re GGPPA* fell outside of federal jurisdiction.

Key Contacts: [Sarah V. Powell](#), [Alexandria J. Pike](#) and [Marie-Claude Bellemare](#)