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Federal Impact Assessment: Legislative Amendments and Cabinet Directive

Authors: Alexandria J. Pike and Zachary Silver

Background

The Canadian government recently enacted the highly anticipated amendments to the *Impact Assessment Act* (IAA). These amendments, which came into force on June 20, 2024, address the constitutional overreach in the IAA, as identified by the Supreme Court of Canada (SCC) in its opinion of October 13, 2023, in *Reference re Impact Assessment Act*.

In a non-binding advisory opinion, the SCC found that the IAA was unconstitutional, in part, because it allowed the federal government to make decisions on designated projects that are not sufficiently connected to "effects within federal jurisdiction" (for further details see our bulletin). Having accepted the SCC's guidance, the federal government vowed to make "surgical amendments" to ensure the constitutionality of the IAA. True to promise, the changes are very focused, leaving most of the IAA regime intact. However, questions remain as to whether the amendments will be enough to avoid future constitutional challenges.

In addition, on July 5, 2024, a Cabinet Directive called for a "culture change" to accelerate federal impact assessment and permitting processes related to "clean growth projects" necessary for decarbonization.[1] The Cabinet Directive mandates a new Clean Growth Office to coordinate federal permitting of projects designated under the IAA (as well as other non-designated projects and those initiated by federal entities).

Amendments to the *Impact Assessment Act*

The IAA amendments attempt to address key issues raised by the SCC's opinion but do nothing to improve the systemic issues of transparency and delay that have been a source of criticism for decades. In particular, the IAA amendments focus on the following:

Effects within federal jurisdiction. These effects will still be identified and subjected to the decision-making processes under the IAA. The amendments redefine such effects to ensure that they more clearly fall within federal jurisdiction. For example, effects in another province have been removed from the definition of effects within federal jurisdiction. Interprovincial effects are therefore no longer expressly subject to assessment. As well, effects will be assessed only if they meet minimum thresholds: they must now be non-negligible and adverse.

Steps for decision-making. Two steps are now required for decision-making relating to the significance and justification of anticipated effects (reintroducing concepts from the *Canadian Environmental Assessment Act, 2012*):

- First, possible *mitigation* measures must be considered, as decision-makers determine if the subject effects are *significant*. If the effects are not significant, the assessment process comes to an end, and the project is approved.
- Second, if the effects are significant, the existing public interest test now requires a determination of whether the effects are *justified* in the public interest.

Public interest test. In response to the SCC's criticism of the breadth of the public interest test, amendments have been made to link the factors to be considered in the test with effects within federal jurisdiction. However, broad concepts remain (such as "sustainability") and may attract further scrutiny.

Collaboration between governments. Certain minor amendments have been made to foster greater collaboration between the provincial and federal governments, in keeping with the SCC's call for flexible and cooperative federalism in the impact assessment process. However, these changes do not, on their own, address the underlying issue of delay.

Cabinet Directive Regarding IAA

The Cabinet Directive emphasizes that federal entities are to "drive culture change" and act with a "culture of urgency" to address immediate risks of climate change. A new Clean Growth Office within the Privy Council Office is directed to collaborate with the Impact Assessment Agency of Canada (Agency) to develop permitting plans and ensure transparency of impact assessment and permitting processes. Importantly, the Cabinet Directive sets timelines for IAA and permitting processes, as follows:

- For designated projects under the IAA, federal entities are directed to complete impact assessments and permitting processes *within five years*.
- The Agency and the Canadian Nuclear Safety Commission are to ensure nuclear project reviews are conducted *within three years*.

For decades, proponents, lenders and investors have sought a more streamlined and timely federal impact assessment system. Meanwhile, opponents of the federal IAA were rewarded with the 2023 SCC opinion regarding unconstitutionality. While the responding IAA amendments appear to address the majority of the SCC's concerns regarding constitutionality, none of the amendments address chronic delays in the federal assessment and permitting system. The Cabinet Directive makes clear the urgent need for change. If achieved, the new timelines under the Cabinet Directive would reduce delays for the key clean growth sectors by many years. The proof will be in the Cabinet Directive's implementation.

[1] "Clean growth" projects are those that would advance Canada's climate, biodiversity and economic objectives and are fundamental to the transition to net zero. The Cabinet Directive expressly references projects in the following sectors: green manufacturing, critical minerals, clean power/electricity, nuclear, enabling infrastructure and clean fuels (for hard-to-abate sectors).

Key Contacts: Alexandria J. Pike, Sarah V. Powell and Marie-Claude Bellemare