

## Constitutional Caution, Correction, and Abdication: The Proposed Amendments to the *Impact Assessment Act*

By: David V. Wright

**Matter Commented On:** Proposed Amendments to the Federal *Impact Assessment Act* following *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#)

Last week, the federal government released [proposed amendments](#) (beginning at 557) to the *Impact Assessment Act* ([SC 2019, c 28, s 1](#)) (*IAA*). These come in the wake of *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#) (*Re IAA*), where a 5:2 majority of the Supreme Court of Canada (SCC) found the federal impact assessment regime unconstitutional in part. This post briefly sets out the legal backdrop for the proposed amendments, discusses key proposed changes, and then concludes with commentary on implications going forward. For detailed commentary on *Re IAA*, see [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#). Overall, this package of proposed amendments represents a constitutionally cautious approach to correcting constitutional problems, including one excessive over-correction where caution is tantamount to abdication (interprovincial effects of greenhouse gas emissions).

### Legal Backdrop

*Re IAA* was a reference case, meaning that the Court released a non-binding advisory opinion rather than a binding decision. However, it is customary in Canada for governments to treat such opinions as if they have the force of law, as was the case in this matter (see explainers [here](#) and [here](#)). Soon after the Court released its opinion, the federal Minister of Environment and Climate Change [indicated that the government would “course correct”](#). Likewise, the federal Minister of Natural Resources said that the government would address the constitutional concerns of the SCC [in “a relatively surgical way”](#). Since that time, tabling of these proposed amendments has been an inevitability. Now that they have been released, it is plain to see that the amendments are indeed quite targeted, and therefore far from an overhaul.

This post focuses on the three main areas of change: adjusting the definitions and prohibitions provisions to be more explicitly tied to adverse effects on areas of federal jurisdiction, adding a provision to the screening decision (i.e., the early decision as to whether or not a full impact assessment is required) to more clearly tie it to risks of adverse effects on areas of federal jurisdiction, and restructuring the final decision-making framework to more clearly tie it to a primary consideration of adverse effects on areas of federal jurisdiction. Overall, and unsurprisingly given comments from the federal ministers, the proposed amendments take a targeted approach to bringing relevant provisions into conformity with the views of the majority in *Re IAA*.

Before turning to the specific proposed amendments, it is important to acknowledge that the overall structure of the federal regime remains intact. For example, the planning phase would remain essentially unchanged, as would the assessment phase and the broad set of factors for consideration under s 22, which include aspects such as climate change, sustainability, gender, alternatives to the project, and cumulative effects. Presumably those features remain unaltered because the majority did not take issue with them from a constitutional perspective. Indeed, the majority was clear in stating that “[i]t would be artificial and ineffective to restrict the collection of information at the assessment phase to those components of the environment that are within federal jurisdiction” (para 177, see also paras 160 and 206), and, more broadly, that there is a constitutional basis for federal impact assessment (paras 2, 3, 116 and 206).

It is also clear, however, that in preparing this package of proposed amendments, the federal government did not revisit in any meaningful way the many more creative proposals for reform that were put forward in the [final report of the expert panel](#) that reviewed the federal regime back in 2016-2017. Discussion of broader reform is beyond the scope of this blog post and, for better or worse, will likely be dormant for a long time.

## Proposed Amendments

### *Definitions and Prohibitions*

A core concern of the majority was the overbreadth of the federal effects definition in section 2 and the related prohibition provisions in section 7. To address this, the proposed amendments would introduce “adverse effects within federal jurisdiction” as a defined term (from just “effects within federal jurisdiction”) that includes the term “non-negligible” throughout. For example, the amended sub-provision (a)(i) regarding fish and fish habitat would state:

***adverse effects within federal jurisdiction*** means, with respect to a physical activity or a designated project,

(a) a non-negligible adverse change to the following components of the environment that are within the legislative authority of Parliament:

(i) fish and fish habitat, as defined in subsection 2(1) of the Fisheries Act...

The new “non-negligible” qualifier would be included in all aspects of this revised definition, meaning that the definition is now focused on *adverse* effects (as opposed to all effects, positive and negative) and these effects must be *non-negligible* (for discussion on what this means, see existing detailed guidance from the Agency [here](#), at part 5). With this change, the proposed amendments directly incorporate the suggestion spoon-fed by the majority in 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”.”

Similarly, the proposed amendments would narrow and trim the prohibition provisions in s 7. The majority was particularly concerned with the original provisions prohibiting a proponent from “doing any act or thing that may cause any ‘change’ or ‘impact’ specified in the provision”

(para 193), which they interpreted to prohibit “causing any positive or negative changes or impacts of any magnitude” (para 193). To address this concern, s 7(1) would be amended to move away from “a change” to instead focus on “adverse effects within federal jurisdiction”. The same change would be introduced to 7(3), which is the provision dealing with proponent’s permission to proceed under certain conditions.

Together, the changes to this key definition and the prohibition provisions represent the federal government indeed taking a surgical approach to amending the original text to conform with the constitutional concerns expressed by the majority.

However, there is one change to the prohibitions aspect that goes beyond surgical. These amendments would remove the broad s 7 prohibition against “a change to the environment that would occur... in a province other than the one in which the act or thing is done” and the associated aspect of the federal effects definition in s 2. The amendments would replace that broad provision with two specific, narrow types of interprovincial effects: non-negligible adverse effects on the marine environment caused by pollution and that would occur outside Canada (at (c)), and a non-negligible adverse change to “boundary waters or international waters, as those terms are defined in subsection 2(1) of the Canada Water Act, or to interprovincial waters” (at (d)). Gone is any interprovincial effects provision that would capture effects of greenhouse gas emissions or effects any cross-border air pollution at all.

This proposed amendment is no doubt in response to the majority’s concern that “[t]he breadth of this ‘interprovincial effects’ clause is astonishing” (para 183). As I explained and critiqued in this [previous post](#), the majority was particularly concerned with what this meant in terms of greenhouse gas emissions, and even went so far as to call out the federal government for “attempting to do an end run around this Court’s recent national concern jurisprudence” (para 189). In practical terms, the proposed amendment represents a change that goes beyond the surgical correction to intentional abdication. It was clear from the majority opinion that it was still open to the federal government to make the case that, under the Peace, Order and Good Government national concern branch, it has jurisdiction in relation to inter-provincial effects from a project’s greenhouse gas emissions. With this package of amendments, the federal government has clearly chosen to not pursue that legal argument and associated inclusion in the federal regime. I return to this below in the implications portion of this post.

### ***Screening Decision***

The SCC majority found that “the screening decision under s. 16(2) is not driven by possible federal effects and therefore fails to focus the scheme on the federal aspects of designated projects.” (para 150) The majority was “not satisfied that this decision performs the funneling function necessary to maintain the scheme’s focus on federal impacts” (para 151) and was preoccupied with a need for the *IAA* to give “primacy to the possibility of adverse effects relative to the other mandatory consideration” (para 152).

The proposed amendments address this concern through an explicit new “limitation” in new sub-provision 16(2.1): “The Agency may decide that an impact assessment is required only if it is satisfied that the carrying out of the designated project may cause adverse effects within federal

jurisdiction or direct or incidental adverse effects.” For the most part, the original s 16(2) factors remain intact (e.g., comments from the public and Indigenous communities, regional studies or plans from other jurisdictions, and regional or strategic assessments completed under the *IAA*), but this new sub-provision creates, to use the majority’s metaphor, a “funneling function” that requires an ultimate focus on adverse effects within federal jurisdiction. To perhaps state the obvious, the important and operative terms in that new provision are “only if”. Put plainly, under the proposed amendments, no risk of adverse effects within federal jurisdiction means no federal assessment. This should sufficiently address the majority’s view that the original s 16(2) factors were “all of seemingly equal importance” (para 151). New sub-section 16(2.1) would be unmistakably more important. In similar fashion and no doubt for similar reasons, the proposed amendments also include a nearly identical change to the Minister’s discretionary power under s 9(1) to designate a project a project not included in the project list.

There is one noteworthy proposed addition to the 16(2) factors. A new subsection 16(2)(f.1) would introduce the following factor: “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 designated project” (and there is a nearly identical change to 9(2) regarding the Minister’s discretionary power to designate a project). This is one of several proposed amendments that expands the legislative basis for federal assessment to give way to other jurisdictions’ processes (e.g., Alberta? Ontario?) if those processes address considerations and protections set out in the federal regime. Whether that other jurisdiction’s process would actually follow through, and the wisdom of expanding such discretion, is certainly an open question. At first blush, this amendment could be read as a permissive basis for the Agency to decide to completely step away from assessing a project even if the project is expected to cause adverse effect within federal jurisdiction. (#blankchequevibes)

### ***Decision-making***

The majority articulated its primary concern with the original decision-making framework as follows:

The central problem with the public interest decision is not the s. 63 factors themselves but rather the manner in which these factors drive decision making. The public interest decision must reflect a focus on the project’s federal effects. As I will explain, however, s. 63 permits the decision maker to blend their assessment of adverse federal effects with other adverse effects that are not federal, such as the project’s anticipated greenhouse gas emissions (under s. 63(e)). Put another way, the adverse *non-federal* effects can amplify the perceived severity of the adverse *federal* effects and, effectively, become the underlying basis for the conclusion that the latter are not in the public interest. The mandatory cumulation of adverse non-federal effects shifts the focus of the decision from the adverse effects within federal jurisdiction to the overall adverse effects of the project. (para 169)

To address this, the proposed amendments would structure final decision-making to turn primarily on whether adverse effects within federal jurisdiction are likely to be significant, and,

if so, whether they are justified in the public interest. This amendment would adopt the surprisingly pointed guidance offered by the majority at paragraph 175 by essentially reverting to the approach of *Canadian Environmental Assessment Act, 2012* ([SC 2012, c 19, s 52](#)) (*CEAA 2012*). In doing so, the proposed amendments would ensure that the public interest decision reflects “a focus on the project’s federal effects” (para 169) and would safeguard against the concern of the majority that the original *IAA* approach permitted the “decision maker to blend their assessment of adverse federal effects with other adverse effects that are not federal” (para 169). Put another way using the words of the majority, this change provides the legislative framework to ensure that “[t]he public interest decision must focus on the acceptability of the adverse federal effects” (para 206).

This change does not, however, eliminate the original s 63 public interest factors. Rather, those factors must still be considered as part of the justification analysis. Instead of paraphrasing and losing nuance in translation, here are the two proposed changes to s 60(1) (for decisions by the Minister on assessments by Agency or by substitution) and 61(1) (for decisions made by Governor in Council on assessments by review panel, and note that the language is substantively the same under s 62 for decisions referred by a minister to Governor in Council):

### **Minister’s decision**

60 (1) After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment of the effects of a designated project in respect of which the Minister has approved a substitution under section 31, the Minister must

(a) determine, after taking into account the implementation of any mitigation measures that the Minister considers appropriate, whether the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that are indicated in the report are likely to be, to some extent, significant and, if so, the extent to which those effects are significant; and

(b) if the Minister determines that any of the effects referred to in paragraph (a) are likely to be, to some extent, significant, determine whether the effects so determined are, in light of the extent to which the Minister determined them to be significant and the factors referred to in section 63, justified in the public interest

...

61 (1) After taking into account the report with respect to the impact assessment of a designated project that the Minister receives under section 55 or that is submitted to the Minister under section 59, the Minister, in consultation with the responsible Minister, if any, must refer to the Governor in Council

(a) the matter of determining, after taking into account the implementation of any mitigation measures that the Governor in Council considers appropriate, whether the adverse effects within federal jurisdiction — and the direct or incidental

adverse effects — that are indicated in the report are likely to be, to some extent, significant and, if so, the extent to which those effects are significant; and

(b) the matter of determining whether the effects, if any, that are likely to be, to some extent, significant are, in light of the extent to which they are significant and the factors referred to in section 63, justified in the public interest.

In short, the proposed amendments restructure things such that the original s 63(b) (adverse effects) are now in (a) and (b) of sections 60(1), 61(2), and 62. Meanwhile, the original s 63(a) (contribution to sustainability), s 63(d) (s 35 rights), and s 63(e) (climate change) are now subsections 63 (c), (a), and (b), respectively. This table provides a side-by-side view (using amended s 62 as the basis):

IAA – Original Text	IAA – Amendment Text
<b>63 (a)</b> the extent to which the designated project contributes to sustainability;	<b>63 (c)</b> the extent to which the effects that are likely to be caused by the carrying out of that project contribute to sustainability.
<b>63 (b)</b> the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;	<b>62 (a)</b> determine, after taking into account the implementation of any mitigation measures that the Governor in Council considers appropriate, whether the <u>adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that are indicated in the report are likely to be, to some extent, significant and, if so, the extent to which those effects are significant;</u> (emphasis added)
<b>63 (c)</b> the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;	<b>62 (a)</b> determine, <u>after taking into account the implementation of any mitigation measures that the Governor in Council considers appropriate,</u> whether the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that are indicated in the report are likely to be, to some extent, significant and, if so, the extent to which those effects are significant; (emphasis in original, denoting amended text)
<b>63 (d)</b> the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed	<b>63 (a)</b> the impact that the effects that are likely to be caused by the carrying out of that project may have on any Indigenous group and any adverse impact that those effects may have on the rights of the Indigenous peoples of Canada

by section 35 of the <i>Constitution Act, 1982</i> ; and	recognized and affirmed by section 35 of the Constitution Act, 1982;
<b>63 (e)</b> the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.	<b>63 (b)</b> the extent to which the effects that are likely to be caused by the carrying out of that project contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change

In practical terms, the result of these changes is to structure decision making such that the decision-maker may consider the broader factors, but in a context where it is the adverse federal effects that “drive the ultimate conclusion” (para 178) and focus the public interest decision “on the acceptability of the adverse federal effects” (para 206).

The majority was particularly concerned with the *IAA*’s granting “the decision-maker practically untrammelled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety” (para 178). In my view, the proposed amendments largely address this concern if one reads that majority interpretation as mostly concerned with “practically untrammelled power” and the constitutional imperative that the Minister’s decision be primarily focused on the federal jurisdiction at issue, such as fisheries or navigation. But make no mistake: the amendments would retain a strong federal basis to reject a major project with significant adverse federal effects by virtue of those federal effects not being justified in the public interest. That would not be “untrammelled power”; rather, it would be exercise of well established federal constitutional authority. In other words, and to again use the words of the majority, the federal decision under the amended approach may well lead to rejection of the projects, but that would not be as part of “evaluating the wisdom of proceeding with the project as a whole” (para 206); rather, it would be about the wisdom of proceeding with the various adverse impacts on federal jurisdiction. The primary axis of that public interest decision has been fundamentally and explicitly changed and clarified. And to the extent that there remain open questions on this matter (e.g., whether a decision veered “toward regulating the project *qua* project”, at para 206), judicial review remains available, and, frankly, entirely foreseeable in coming *IAA* implementation months and years given that this has been the case since federal assessment began more than 40 years ago.

It is also worth noting that the majority’s discussion of weighing costs and benefits on a “ledger” in the *IAA* decision-making framework is challenging to understand. My colleague, Prof. Martin Olszynski, and JD student, Nathan Murray (now graduated), engaged in an excellent analysis in this [recent post](#). For now, I will leave it to them to relate the proposed amended decision-making paradigm to their several interpretations. What is clear, however, is that the costs side of the ledger is now very clearly focused on federal effects (i.e., adverse effects), and the benefits side of the ledger turns on the justification analysis “in light of” the s 63 factors. Those s 63 factors are now three: contribution to sustainability, s 35 rights, and commitments in respect of climate change. The extent to which those three considerations can drive a final decision concluding that the adverse federal effects are *not* justified such that the project is rejected, would remain an

open question under the proposed amendments. In other words, and to relate this back to the majority's concerns, it is unclear to what extent the amended framework still permits "non-federal concerns to stack up on the 'adverse' side of the ledger" to some degree (para 174).

However, looking at each of the three remaining public interest factors reveals additional, but not complete, clarity. With respect to s 35 rights, it is not hard to see that those will not be "non-federal concerns" (apologies for double negative). With respect to sustainability, the proposed amendments would still provide a basis, notwithstanding the framing of "contribute to", for the decision maker to find that a project provides a limited or counterproductive contribution to sustainability which pushes toward adverse federal effects not being justified on the basis of non-federal effects. Likewise with respect to climate change commitments, the amendments provide a basis for the decision-maker to conclude that a project does not contribute to, or is a counterproductive contribution to, the Government of Canada's ability to meet its commitments in respect of climate change. Having said that with respect to the climate change factor, it is surprising to see that where the original *IAA* provision included extent to which effects of the project "hinder or contribute", the amended version would remove hinder and leave only contribute, suggesting a thumb on the scale of using this provision as a positive factor for justification (somewhat speculative, but perhaps this is geared toward approval of clean energy and critical mineral projects in line with net-zero pathways).

Further analysis is required to build on these preliminary impressions. However, from a constitutional law perspective, one way to consider the proposed amendments is in relation to the presumption of constitutionality. A close read of the majority and minority discussion on this aspect suggest that this was a close call for the SCC (paras 65 – 74, and 229 – 234, respectively). The amended decision-making framework, including the latitude still afforded through consideration of the s 63 public interest factors, would almost surely provide a basis for the presumption of constitutionality to support a finding that those provisions are now constitutionally safe. In practical terms, however, it would be up to future decision-makers to carefully explain a justification analysis and to do so in a manner that minimizes "non-federal effects" to "stack up on the 'adverse side' of the ledger" (para 174). The key place to do so would be the "detailed reasons" provision in *IAA* s 65(2), which would remain unchanged under the proposed package of amendments. Finally, even if there is some degree of non-federal effects underpinning the detailed reasons explaining rejection a project, under the amended approach that would still all be in relation to the primary focus on the adverse effects on federal jurisdiction, which may well be enough to conform with the views of the majority.

### ***Implications***

The proposed amendments are not surprising given the federal government's comments soon after *Re IAA* was released last October. They represent a package of targeted changes that take seriously the constitutional concerns articulated by the majority. In doing so, the proposal also represents this federal government's respect for the role of the judicial branch and rule of law, which is not an insignificant thing in the present context. But the amendments as proposed also represent a constitutionally cautious approach. Yes, under the proposed approach the federal government remains very much in the impact assessment constitutional space, continuing to exercise jurisdiction confirmed by the majority; however, in the key areas discussed above the



federal government opted for constitutionally safe paths. The amendments also represent a very deliberate choice to not engage in any magnitude of overhaul that took place in 2012 and then in 2019.

Much of the federal government's constitutional caution here is warranted given *Re IAA*, but as noted above, one significant change that could be viewed as abdication rather than just cautious correction is removal of the broad prohibition related to inter-provincial effects. That change would mean that greenhouse gas emissions cannot be used as a basis for triggering or decision-making in the federal regime. In practical terms, that means the federal government has chosen the "simply backing off" option that I previously described [here](#). This amendment would no doubt be welcomed by those who had concerns about federal assessment of major oil and gas projects on the basis of GHGs alone, including in situ oil sands projects. But for those who suggest that an all-of-the-above approach is needed in the present climate emergency context (present company included, and see this [analysis by Dr. Meinhard Doelle](#) on the potential roles of impact assessment in climate change mitigation), federal impact assessment as a useful climate change mitigation tool would evaporate under these amendments. Or at least it would at the front and back end of the federal process, but not in the middle stages. The planning and assessment phases incorporation of climate change and greenhouse gas emissions information would remain, underpinned by the majority being clear that there are no constitutional constraints on those phases. At a practical level, it will be interesting to see how the Agency engages in revising the guidance generated through the Strategic Assessment on Climate Change process. Presumably most of that can stand without change, but for the aspects dealing with decision-making. But even then, it is reasonable to expect that the Agency will elucidate what the new s 63(b) means, including the removal of the key word "hinder".

Zooming back out and reflecting more broadly on where these amendments would leave federal impact assessment in Canada, it seems that both sides of *Re IAA* can continue to claim victory in the wake of the SCC opinion. On one hand, federal assessment is still very much here and on solid, clearly confirmed constitutional footing. The planning and assessment phases are intact, as is the designated projects approach. Even the public interest determination factors live on to some degree. And, of course, concerns and constraints being discussed here (and in the majority opinion) are relevant only in relation to projects that are primarily regulated by a province (so, projects like mines and electricity generation, but not interprovincial pipelines and railways, which are explicitly federal). On the other hand, however, given that the *IAA* was premised on the *CEAA 2012* structure that dramatically reduced federal assessments from 1000s per year to just dozens, and given that the proposed amendments would narrow the regime even further in terms of triggers and decision-making parameters, one could fairly argue that federal impact assessment would be significantly weakened by these amendments. Time will tell what that means for human health, ecosystems, the rights and interests of Indigenous peoples, and economic development.

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