WEST COAST Environmental Law

700-509 Richards Street, Vancouver, BC V6B 2Z6 | Coast Salish Territories
xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish) & sə̓lilwətaʔɬ (Tsleil-Waututh)
T 604.684.7378 | 1.800.330.WCEL | F 604.684.1312 | admin@wcel.org
@WCELaw | wcel.org

BRIEF: AMENDMENTS TO THE IMPACT ASSESSMENT ACT

In June 2024, amendments to the federal *Impact Assessment Act* came into force. Introduced in **Budget Bill C-69**,[1] the amendments do two things. First, they address constitutional issues identified by a majority of the Supreme Court of Canada in ***Reference re Impact Assessment Act***.[2] Second, they implement recommendations of the **Ministerial Working Group on Regulatory Efficiency for Clean Growth Projects** on how to 'modernize' and streamline federal impact assessment (IA).[3]

This brief describes the amendments and their implications for federal IA. First, it explains what IA is, why it is important, and why the *Impact Assessment Act* was amended.

BACKGROUND

What is impact assessment?

IA is our main tool for evaluating the risks and benefits of projects and activities like pipelines, dams and mines. It was first introduced in 1973 as a policy directing federal decision-makers to consider the environmental implications of their decisions, such as decisions about whether to issue a permit to a project proponent. The *Impact Assessment Act* (IAA) is Canada's fourth assessment law. It was enacted in 2019 to replace the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), which had **been criticized** for not respecting Indigenous rights, limiting who could participate in assessments, imposing arbitrary timelines, not applying to thousands of activities that affect the environment, and ignoring the social and economic effects of projects.[4]

Here at West Coast, we are **advocates of "next-generation" impact assessment**. Among other things, next-generation IA is designed to foster sustainability, respect Indigenous rights and jurisdiction, meaningfully engage the public and result in credible, transparent decisions about all activities that could harm the environment. The IAA does some of those things. For example, assessments must consider all environmental and socio-economic effects and impacts on Indigenous peoples and rights. They must also offer opportunities for meaningful public participation and Indigenous engagement and does not limit who can participate. On the other hand, timelines are now shorter than they were under CEAA 2012, and the IAA is designed to only apply

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[1] Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*, 1st Sess, 44th Parl, 2024, ch 17.

[2] *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII).

[3] Ministerial Working Group on Regulatory Efficiency for Clean Growth Projects, *Building Canada's Future: A plan to modernize federal assessment and permitting processes to get clean growth projects built faster* (2024).

[4] West Coast Environmental Law and Ecojustice, *What Bill C-38 Means for the Environment* (2012).

to a dozen or so "major" projects every year, meaning that thousands of projects and activities that impact the environment continue to go unassessed annually.

Why did the IAA need to be amended?

In October 2023, a majority of the Supreme Court of Canada declared that the main scheme of the IAA overstepped federal jurisdiction and was therefore unconstitutional. **This blog** gives a detailed explanation of what the Court said.[5] In summary, the majority Court held that the Act overstepped federal jurisdiction for two reasons:

1. Key decisions, such as whether an IA is required and whether the adverse federal effects are in the public interest, could be driven by non-federal considerations.
2. The effects defined as "federal" under the Act exceed federal jurisdiction.

As a result, the federal government had to amend the IAA to fix the issues identified by the majority of the Supreme Court.

Additionally, the government has expressed a heightened interest in increasing the efficiency of IA and regulatory processes for projects it considers to be "clean" – namely, projects that could help Canada achieve its goal of having net-zero emissions by 2050, and any emissions-reduction targets prior to 2050. In 2023, the Prime Minister appointed the Ministerial Working Group on Regulatory Efficiency for Clean Growth Projects and **mandated it** to: "coordinate Government of Canada efforts to grow the clean economy, create an efficient regulatory framework to support the development of clean growth projects, increase investor confidence, and positively contribute to broader government priorities, including net-zero commitments and advancing reconciliation with Indigenous Peoples."[6]

The Working Group published its plan in June 2024. So-called "clean growth projects" include "clean electricity" generation and transmission (including hydro, wind, solar and "clean" hydrogen), "clean fuels" generation and transmission (including biomass/biofuel projects), carbon capture and storage, infrastructure, "clean technology," "forestry clean technology," small modular reactors, and critical minerals mines and processing.[7] The Working Group's recommendations include advancing reconciliation with Indigenous peoples through enhanced Indigenous engagement and cooperation with Indigenous jurisdictions, reducing duplication with the provinces and territories, and improving coordination among federal assessment and regulatory authorities.

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[5] Anna Johnston, "Two wins, a loss, and a question mark: What the Impact Assessment Act reference case means for the environment" (West Coast Environmental Law: 2023).

[6] Ministerial Working Group on Regulatory Efficiency for Clean Growth Projects, *Building Canada's Future: A plan to modernize federal assessment and permitting processes to get clean growth projects built faster* (2024) at 4.

[7] *Ibid* at 8, 10.

AMENDMENTS TO THE IMPACT ASSESSMENT ACT

As noted above, the IAA was amended to achieve two goals: fix the constitutional issues identified by the Supreme Court and implement measures to improve the efficiency of the Act. This brief discusses each of those sets of amendments in turn.

Amendments to make the IAA constitutional

1. Purpose and focus

To begin with, a series of amendments were made to the Act to more clearly demonstrate that the fundamental purpose of the IAA is to prevent and mitigate significant adverse effects on areas of federal jurisdiction. The amendments are to the Act's long title, preamble, purpose provision, and to a provision describing the mandate of federal authorities when exercising powers under the Act. Table 1 summarizes these amendments.

Table 1: Summary of amendments to clarify the focus of the IAA is on adverse federal effects

Sec.	Previous language	New language
	Title: An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects	**Title**: An Act respecting a federal process for impact assessments and the prevention or mitigation of significant adverse effects within federal jurisdiction
	Preamble: Included a commitment to sustainability, meeting Canada's environmental obligations and climate commitments, and integrating science and Indigenous knowledge into decisions	**Preamble:** Removed commitments to sustainability, removed statements recognizing the role of IA in meeting Canada's environmental obligations and climate commitments and in integrating science and Indigenous knowledge into decisions
6	**Purposes:** Included things like fostering sustainability, precautionary principle, meaningful public participation, etc.	**Purposes:** Limited to preventing or mitigating significant adverse effects within federal jurisdiction and direct or incidental effects
13	**Mandate:** Federal authorities must exercise powers in a manner that fosters sustainability, respects Indigenous rights and applies the precautionary principle	**Mandate:** Strengthened the original and added some of the things removed from the purposes (i.e., federal authorities must also take into account Indigenous knowledge, consider cumulative effects, apply the precautionary principle and promote cooperation with provinces and Indigenous peoples)

2. Definition of effects within federal jurisdiction

The amendments also changed the definition of which effects are deemed to be within federal jurisdiction under the Act. Originally, the defined term was called, "effects within federal jurisdiction." Because the Supreme Court questioned Parliament's ability to regulate positive effects, the term has been changed to "adverse effects within federal jurisdiction." Table 2 summarizes the changes to the definition.

Table 2: Summary of amendments to the definition of effects within federal jurisdiction

Sec.	Previous language	New language
2	Included positive and negative effects Included effects of any magnitude Included all transboundary effects Did not include many types of federal effects (e.g., navigation)	Only includes adverse effects Only includes non-trivial effects Only includes a subset of transboundary effects: • Marine pollution • Pollution to transboundary waters Still does not include many types of federal effects (the same as those not included prior to the amendments) For projects carried out on federal lands or that are "federal works or undertakings" as defined in section 3(1) of the *Canadian Environmental Protection Act, 1999*, the definition includes all non-negligible adverse effects.

3. Decisions about whether an IA is required

The IAA designates projects for impact assessment in two ways: through *Physical Activities Regulations* that describe projects by type and size, and by a discretionary decision by the Minister upon application by a member of the public or an Indigenous person or body. Designated projects do not automatically require an IA: during the initial planning phase, the Impact Assessment Agency of Canada decides whether an assessment is required. The Supreme Court took no issue with the *Physical Activities Regulations* but held that the Minister's discretionary power and the Agency's screening decisions could be more clearly focused on projects' potential to cause adverse federal effects. Table 3 summarizes the changes to the Minister's designation power and the Agency's screening decision.

Table 3: Summary of amendments to clarify that decisions about whether an IA is required must be based on the potential for adverse federal effects

Sec.	Previous language	New language
9	**Designation power**: Minister may designate if project may cause adverse federal effects	**Designation power**: Minister may designate if project may cause adverse federal effects, adverse direct or incidental effects, or public concerns about federal effects warrant designation
16	**Screening decision**: Agency can require an IA based on considerations other than potential for adverse effects	**Screening decision**: Makes potential for adverse federal effects a prerequisite for an assessment

4. Final decision

The biggest issue the majority of the Supreme Court took with the IAA is that the final decision – whether the project's adverse federal effects are in the public interest – could be informed by 'non-federal' adverse effects. The final decision is made by either the Minister or Governor in Council, depending on the type and complexity of the project. According to the majority of the Court, if a decision-maker were to consider 'non-federal' adverse effects (such as whether the project overall hinders sustainability), it would turn the decision into one that is about the project overall, not just its federal aspects (see **our blog** for a critique of the majority's reasoning).

The amendments are aimed at addressing the Court's concerns by breaking the decision out into two parts. First, the Minister or Cabinet decides how significant any adverse federal effects will be. Then, they decide whether those effects are justified in light of the assessment report, any impacts on Indigenous rights, the extent to which the project fosters (but not hinders) sustainability, and the extent to which it helps (but not hinders) Canada's ability to meet its climate commitments and environmental obligations. Table 4 summarizes amendments to the final decision under the Act.

Table 4: Summary of amendments to ensure that the final decision is truly about adverse federal effects

Sec.	Previous language	New language
60-62	**Decision:** One step: Minister or Governor in Council decides whether adverse federal, direct or incidental effects are in the public interest in light of the section 63 factors (below) and the extent to which the federal effects are significant	**Decision**: Turns it into two steps and moves two of the factors to consider into the first step: Minister or Governor in Council decides: a) Whether, after mitigation, the adverse federal, direct or incidental effects are likely to be to some extent significant, and the extent to which they are significant; and

		b) If the effects will be to some extent significant, whether they are in the public interest in light of the extent of their significance and the section 63 factors
63	**Factors to consider**: i. Extent to which project fosters sustainability ii. Extent to which federal effects are significant iii. Mitigation iv. Impacts on Indigenous peoples and rights v. Extent to which project helps or hinders Canada's ability to meet its climate commitments and environmental obligations	**Factors to consider:** i. Impacts on Indigenous peoples and rights ii. Extent to which the effects contribute to Canada's ability to meet its climate commitments and environmental obligations iii. Extent to which the effects of the project contribute to sustainability

AMENDMENTS AIMED AT EFFICIENCY

1. Reliance on provincial processes

A key concern of the Ministerial Working Group was better coordination with provincial assessments. Before the amendments, the IAA allowed the federal Minister to substitute a provincial assessment for a federal one. At the time of writing, only British Columbia had entered into a **cooperation agreement**[8] with Canada to allow for substitutions. Criticisms of substitution as a cooperation mechanism are well-documented, with harmonization of federal and provincial processes being considered more effective and efficient.[9] Nonetheless, the Working Group recommended allowing the Minister to substitute *parts* of federal assessments for provincial ones, and to allow substitution for non-assessment (e.g., regulatory) processes. Table 5 summarizes those amendments.

[8] Impact Assessment Cooperation Agreement Between Canada and British Columbia (2020).

[9] See, e.g., A. John Sinclar, Gary Schneider & Lisa Mitchell, "Environmental impact assessment process substitution: experiences of public participants" (2012) IAPA 30:2, 85: **https://www.tandfonline.com/doi/full/10.1080/14615517.2012.667238#d1e324**.

Table 5: Summary of amendments to broaden substitution options

Sec.	Previous language	New language
9	**Designation power**: When deciding whether to designate a project, Minister must consider adverse impacts on the rights of Indigenous peoples and any relevant regional or strategic assessments conducted under the IAA	**Designation power**: Factors to consider now also include: a. Public concerns related to the adverse federal effects; b. whether a means other than an assessment exists that would allow another jurisdiction (like a province) to address the adverse federal effects; and c. any other factor the Minister considers relevant
16	**Screening decision:** Factors for agency to consider include regional and strategic assessments and studies	**Screening decision:** Factors to consider now also include whether a means other than an assessment exists that would allow another jurisdiction (like a province) to address the adverse federal effects
31	**Minister's power**: Minister may approve a substitution of a process for assessing the effects of designated projects	**Minister's power**: Minister may approve a substitution of: d. A process for assessing the effects of designated projects; or e. An assessment process in combination with any other activities described in an agreement with the substituting authority

2. Joint review panels

A second option identified by the Ministerial Working Group for improving federal and provincial cooperation was to allow provincial authorities to jointly appoint review panels for assessments of projects regulated by the Canadian Energy Regulator (CER) and Canadian Nuclear Safety Commission (CNSC). Table 6 summarizes those amendments.

Table 6: Summary of amendments to expand the use of joint review panels

Sec.	Previous language	New language
43.1	**Minister's power:** No power to establish joint review panels with provinces for projects regulated by the CNSC or CER	**Minister's power**: Power to establish joint review panels with provinces for projects regulated by the CNSC and CER

3. Time limits

Mandatory timelines were first introduced in CEAA 2012. Despite the fact that the IAA overall shortened IA timelines, there have been, in our view, misguided allegations that federal assessments cause "delays" to project approvals. While next-generation IA acknowledges that it is more efficient to avoid environmental harms, and while free, prior and informed consent requires Indigenous nations to have the time they need to make decisions,[10] the Ministerial Working Group recommended setting a target of five years or less to complete assessments. Table 7 summarizes amendments made to achieve that target.

Table 7: Summary of amendments to limit timeline extensions

Sec.	Previous language	New language
37	**Review panels:** Governor in Council could extend time limits for review panel reports any number of times	**Review panels**: Governor in Council may only extend time limits for review panel reports once
65	**Decision statement:** Governor in Council could extend time limits for final decisions any number of times	**Review panels**: Governor in Council may only extend time limits for final decisions once

[10] See, e.g., Anna Johnston, *Federal Environmental Assessment Reform Summit Proceedings* (West Coast Environmental Law, 2016): **https://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf**; Robert B. Gibson, Meinhard Doelle and A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment (2016) JELP 29, 257: **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670009**; Assembly of First Nations, *Submission of the Assembly of First Nations ANF) on Free Prior and Informed Consent (FPIC) for the Expert Mechanism on the Rights of Indigenous Peoples*: **https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/FPIC/AssemblyFirstNations_Canada.pdf**.