CANADA'S NEW *IMPACT ASSESSMENT ACT*: A CARBON TROJAN HORSE?

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Introduction

In August 2019, Canada's federal *Impact Assessment Act* (the "IAA") came into force,[1] replacing the *Canadian Environmental Assessment Act, 2012* ("CEAA, 2012")[2] and ushering in Canada's new, although not entirely novel, impact assessment regime. Key objectives of the new regime include a more streamlined and transparent process, greater certainty for developers and increased opportunities for public input. However, the IAA has been criticized for imposing unrealistic standards and undermining future investments in Canada's resource sectors.

The oil and gas sector has been particularly critical of the new regime, suggesting that an assessment under the IAA will involve a purely political exercise, in which projects that fail to advance federal carbon emission reduction targets will be rejected. Those concerns are reflected in the legal challenge initiated shortly after the IAA came into force by the Alberta government, contesting the validity of the IAA in a constitutional reference (the "Reference") before the Court of Appeal of Alberta. Alberta, Canada's largest oil and gas producer, has alleged that the IAA represents a serious intrusion into areas of exclusive provincial legislative jurisdiction, and constitutes a significant threat to Canadian federalism.

Part 1: The New Impact Assessment Regime

Assessment Requirements and Triggers

The requirement to obtain assessments under the IAA is grounded in the fact that certain activities are prohibited under the IAA absent an assessment, or a determination that no assessment is required.

Similar to CEAA, 2012, the IAA prohibits project proponents from doing any act or thing in connection with carrying out a designated project if that act or thing may cause, amongst other things, a change to: (i) certain specified components of the environment that are within federal jurisdiction; (ii) the environment on federal lands, in a province other than where the act or thing is done, or outside of Canada; or (iii) the health, social or economic conditions of the Indigenous peoples of Canada.[3]

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[1] *Impact Assessment Act*, S.C. 2019, c.28, s.1., in force August 28, 2019. Like the former CEAA, 2012, the IAA applies nation-wide, aside from certain specifically excluded areas, such as those covered under the *James Bay and Northern Quebec Agreement*, which are subject to a separate assessment process pursuant to that agreement, Canada's first modern land claim agreement.

[2] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, s.52.

[3] The IAA further provides that no authority may carry out, permit the carrying out, or provide financial assistance to enable the carrying out, of a project on federal lands or outside of Canada unless the authority determines that the project is not likely to cause significant environmental effects, or where any such significant environmental effects have been determined to be justified.

Also similar to CEAA, 2012, assessments are triggered under the IAA by project types designated by regulation (the "Projects List")[4] or ministerial discretion,[5] as well as by projects undertaken or funded by federal authorities on federal lands or outside of Canada.[6]

Finally, under the IAA the federal Minister of Environment and Climate Change (the "Minister") may, at the request of any person, establish a committee to conduct, or authorize the Impact Assessment Agency of Canada (IAAC) to conduct, regional or strategic assessments: the former aimed at evaluating the effects of existing or future physical activities carried out in a particular region, and the latter aimed at evaluating any proposed or existing federal policy, plan or program, or any other issue that may be relevant to conducting impact assessments.

A Broader Assessment Scope

Two novel innovations brought about by the IAA are that impact assessments for major projects will now be administered by a single federal agency, the IAAC, and that such assessments are now expressly required to involve a consideration of a broader range of factors, including:

- the positive *and* negative consequences of changes to the environment, or the health, social or economic conditions that are likely to be caused by a project;
- any Indigenous knowledge provided with respect to the project, and the impact that the project may have on Indigenous peoples and their rights;[7]
- the extent to which the project contributes to sustainability;
- the extent to which the effects of the project hinder or contribute to the federal government's ability to meet its environmental obligations and commitments in respect of climate change; and
- the intersection of sex and gender with other identity factors.

These factors significantly expand the scope of assessments, requiring analysis of sustainability, carbon impacts and impacts on Indigenous rights, while also considering the social and economic benefits of a project early in the assessment process. In contrast, under the former CEAA, 2012, the benefits of a proposed project were only taken into account *after* it had been determined that the project was likely to cause "significant adverse environmental effects", and a determination then needed to be made as to whether such effects were justified in the circumstances.

Planning Phase Requirements and Ministerial Veto

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[4] *Physical Activities Regulations*, SOR/2019-285.

[5] In order to designate a physical activity, the Minister must be of the opinion that the activity may cause adverse effects (direct or incidental) or public policy concerns within federal jurisdiction.

[6] The project types covered by the *Projects List* are largely consistent with those previously designated under CEAA, 2012, and include: the construction, operation, decommissioning and abandonment of certain specified types of mines and mills, with production or input capacities exceeding prescribed limits; the construction, operation, decommissioning and abandonment of new oil sands mines with a bitumen capacity of 10,000 m^3/day or more; and the expansion of any existing *in situ* oil sands extraction facilities, where certain conditions are met.

[7] Under CEAA, 2012 it was permitted, but not required, for environmental assessments to take into account community or Aboriginal traditional knowledge.

CEAA, 2012's short project screening process (up to 45 days) has been replaced by the IAA's new mandatory early planning and engagement phase, which involves a 180-day statutory time limit for a federal decision on whether to require a federal assessment. During this phase, proponents are required to provide the IAAC with a description of the project, containing certain information set out by regulation,[8] which must be posted on the IAAC's website for public comment.

During the planning phase, the IAAC must also: (i) ensure the public has an opportunity to participate in a meaningful manner; (ii) offer to consult with any jurisdiction having powers, duties or functions relating to the environmental effects of the proposed project; and (iii) offer to consult with any Indigenous group potentially affected by the project. Every federal authority possessing specialist or expert information or knowledge relating to a proposed project must, at the IAAC's request, make such information or knowledge available to the IAAC. The IAAC must publish on its website a summary of the issues relevant to the project, along with a copy of the proponent's response.

Also new under is the Minister's authority to determine during the planning phase that a proposed project would clearly cause unacceptable environmental effects within federal jurisdiction, or that a federal authority will not exercise a power that would be necessary for the project to be completed, either in whole or in part. This new Ministerial authority – described by some as a "veto" – can only be exercised before the issuance of an impact assessment notice of commencement, and has been criticized as turning the planning phase into a gating exercise, opening up projects to political influence (and potential sacrifice) before a proper scientific analysis has been carried out.

While the planning phase was promoted as a means to identify issues at an early stage and streamline later consultations, many proponents had already been conducting extensive consultations to build consensus with key stakeholders (including Indigenous communities) around a proposed project.

New Public Interest Test

Under CEAA, 2012, a determination had to be made as to whether a project was likely to cause "significant adverse environmental effects", and if so, whether such effects were justified. While the assessment of effects was an analytical process, the determination as to justification was made by a political representative[9], in an opaque manner, and without any specified factors required to be taken into consideration. CEAA, 2012 suffered from widespread criticism that the public was left out of the assessment process and that justification determinations were never fully explained.

In contrast, in an effort to increase transparency on the federal decision-making process, the IAA lists a number of factors that must be taken into consideration by the Minister[10] when determining whether a project is in the public interest, despite the potential impacts identified during the assessment phase. Such factors include whether:

- the project contributes to sustainability;
- identified adverse effects are significant;
- mitigation measures would be appropriate;

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[8] *Information and Management of Time Limits Regulations*, SOR/2019-283.

[9] The Governor in Council.

[10] Or by the Governor in Council, if the Minister exercises his/her discretion under IAA to refer the matter to Governor in Council.

- any Indigenous group, or the rights of the Indigenous peoples of Canada, would be impacted; and
- the effects of the project may hinder, or contribute to, Canada's ability to meet its environmental obligations and climate change commitments.[11]

While such efforts to increase transparency are commendable, critics have expressed concern that environmental issues are given too much priority and economic considerations play no part in the public interest determination. It might be expected that the public interest test should be a balancing exercise but, instead, critics argue that it potentially allows economically viable projects to be vetoed by the federal government based on a narrow set of priorities. Although the IAA lists the considerations the Minister must factor into a public interest determination, no express weighting is given to those factors, leaving their relative importance a matter of discretion, which lends support to the notion that the public interest determination may ultimately turn on whether the project advances or hinders the government's favored policy objectives.

Part 2: Alberta's IAA Constitutional Reference

Canadian Federalism In a Nutshell

Under Canada's federal system of government, and as enshrined in the *Constitution Act, 1867* ("Constitution"), the legislative authority afforded to federal and provincial governments has been delineated. Canadian jurisprudence has, however, confirmed that the "environment" is not a matter over which either level of government has exclusive legislative competence, meaning that both levels of government may enact environmental legislation, so long as it does not encroach on matters exclusively within the jurisdiction of the other level of government.

Alberta's Position

While the Reference has yet to be heard, Alberta is challenging the validity of the IAA and the Projects List on the grounds that the IAA is a "Trojan horse", constituting a threat to Canadian federalism and a marked intrusion into areas of core provincial jurisdiction.

Alberta argues that Canada's federal system of government recognizes the principle of subsidiarity, which reflects the notion that "certain matters are more appropriately regulated at a regional level, closer to the direct impacts of laws and policy making".[12] By subjecting provincial projects having no effects on areas of federal jurisdiction to federal oversight and approval, Alberta asserts that the IAA significantly erodes Canada's commitment to the principle of subsidiarity and may result in the "careful calibration" of local and regional interests being "handed to the remote central government".[13]

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[11] Although the federal government has released guidance that explains the type of greenhouse gas and climate change information that must be supplied by project proponents at each phase of the assessment process, no explanation has been given as to how such information will be used during the public interest determination.

[12] Factum of the Attorney General of Alberta, para 37.

[13] Factum of the Attorney General of Alberta, para 159.

Alberta further alleges the IAA, by imposing international carbon emissions reduction obligations, infringes the provincial power to develop and manage non-renewable natural resources, allowing the federal government to veto projects that are in the provincial public interest.[14]

Likelihood of Success

Alberta has had success recently with a similar constitutional challenge to the federal carbon pricing system under the *Greenhouse Gas Pollution Pricing Act* ("GGPPA").[15] While the issues in that challenge are not identical to those in the Reference, they do touch on related matters, and so it is noteworthy that of the three provincial jurisdictions in which the GGPPA was challenged – Ontario, Saskatchewan, and Alberta – the Alberta Court of Appeal alone found the GGPPA to be unconstitutional (describing the GGPPA as a "constitutional Trojan horse").

The Alberta Court of Appeal's determination on the GGPPA displays, at the very least, a receptiveness by that court to the types of arguments being marshalled by Alberta in the Reference, and so we may expect the Reference to follow a similar course: a win for Alberta, followed by an appeal to the Supreme Court of Canada ("SCC"). As the SCC has yet to issue a decision on the GGPPA, our analogy can take us no further, although it is fair to say that Alberta would find the SCC less disposed than the Alberta Court of Appeal to find a "constitutional Trojan horse", given that the IAA is arguably statutorily limited to the public interest of *federal* effects.

Part 3: A New Era of Impact Assessment

Project proponents would be wise not to await a decision in the Reference but should commence early stakeholder engagement, including consideration of Indigenous rights and knowledge. By proceeding to collect rigorous and robust environmental and socio-economic information, the project will be afforded the best chance of clearing the new early planning phase. Finally, facing climate change implications directly, considering viable mitigation measures and demonstrating strong economic and social partnerships in the subject community will position projects to achieve "public interest" status.

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[14] Alberta points to the fact that *in situ* oil sands projects have been included on the Projects List, despite the fact that Alberta already has a comprehensive regime for the review and approval of such projects

[15] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186.