

# SUPREME COURT FINDS MOST OF IMPACT ASSESSMENT ACT UNCONSTITUTIONAL

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*On October 13, the Supreme Court of Canada ruled that most provisions of the federal Impact Assessment Act (IAA) — those addressing “Designated Projects” and not subject to direct federal involvement — are an overreach of federal authority.*

The court deemed them to be unconstitutional intrusions by Parliament into areas reserved for provincial authority, setting into motion a chain of events that may greatly impact our industry.

“The court deemed them to be **UNCONSTITUTIONAL INTRUSIONS BY PARLIAMENT** into areas reserved for provincial authority”

The Supreme Court opinion was termed merely advisory. However, soon after, on October 26, the Impact Assessment Agency of Canada announced suspension of these provisions and pledged that the Government will enact “targeted amendments” to respond to the ruling. Requirements under other federal or provincial laws aren’t affected, but it’s worth considering which IAA requirements no longer affect the Designated Projects and what the implications are of this change for the industry.

## History, Scope, and Impact of the IAA

The current IAA was enacted in 2019 to replace the 2012 IAA, as the latest in a series of ever-expanding federal environmental impact assessment laws dating back to 1984.

## What types of projects are covered?

The current IAA provides two distinct planning/regulatory programs, with different procedural and substantive requirements:

1. “Projects carried out or financed by federal authorities on federal lands or outside Canada” (referred to commonly and below as “Federal Projects”), and

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2. Designated Projects, that are carried out in Canada or on federal lands and are identified in IAA regulations issued by the Impact Assessment Agency of Canada (the Agency). The Agency’s regulations are broad and cover most aspects of industrial and infrastructure development associated with listed activities including:

- construction, operation, decommissioning and abandonment of a wide range of industrial activities in national parks and protected areas,
- most military- and defence-related projects,

- mines and metal mills,
- nuclear facilities, including specified storage and long-term management or disposal facilities,
- extraction and electricity production from oil, gas, and other fossil fuels,
- electrical transmission lines and pipelines
- renewable energy projects involving hydroelectricity or wind,
- most runways, bridges, tunnels, canals, marine terminals, or railways,
- hazardous waste treatment, incineration, disposal, or recycling facilities,
- large dam, dyke and water diversion projects.

### What evaluative procedures are provided?

Federal Projects and Designated Projects are subject to analogous but different requirements.

Designated Projects are subject to a three-stage process. In each stage project proponents provide specified information to be used by the Agency (or designee) to evaluate possible “effects” and their mitigation/prohibition:

1. Planning
2. Impact assessment
3. Decision-making

IAA and the Agency’s regulations authorize the reviewing agency to call for a wide range of relevant assessments and documentation, including property assessments. For Federal Projects, the relevant federal authority must decide if the project is likely to cause significant adverse environmental effects, and if so must determine whether these effects are justified in the circumstances.

### Why did the court challenge happen?

Previously the Attorney General of Alberta (supported by other provinces) referred questions regarding constitutionality of IAA to the Alberta Court of Appeal. That court found the IAA unconstitutional. The federal government then appealed to the Supreme Court of Canada (SCC) who largely sided with the Alberta court’s ruling.

### What did the Supreme Court say?

All seven SCC justices reaffirmed that the federal government and provinces each have constitutionally legitimate roles in the evaluation and regulation within Canada of activities that may affect the environment. However, five justices found that the IAA’s requirements for Federal Projects fall within the federal government’s legitimate authority, but that IAA’s Designated Project provisions are sufficiently overbroad that they can be applied in situations with insufficient federal authority that therefore encroach into provincial authority. The majority severed the Federal Project and Designated Project portions of IAA, finding the latter portions unconstitutional but preserving the Federal Project portions (two justices would have found all of IAA to be [constitutional](#)).

### Why is the ruling only “Advisory”? Does that matter?

Because this case came to SCC as a referral for constitutional review rather than as a contested legal case, the decision is not binding on the government. However, losing parties generally conform their activities to such decisions, reasoning that they would lose a contested case when one reached the court.

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### What happens next?

On October 26, the Agency issued a formal [statement](#) acknowledging the Supreme Court decision and issued “interim guidance” it will follow while reviewing IAA and preparing amendments for the Government to introduce to bring the legislation and regulations in line with the Court’s opinion.

Actions promised by the Agency include:

- The Agency will (re)assess all presently pending assessments, considering whether they are within federal jurisdiction (23 are under review subject to the 2019 IAA, and 20 more continue under the preceding 2012 IAA),


- The Minister's discretionary authorities to designate projects will be paused, and no new designation requests will be made until after IAA is amended,
- Consultations with Indigenous Peoples will continue through existing assessment processes (these relate to a clear area of federal jurisdiction),
- Proponents are invited to continue to share information, and the 3 assessments underway will continue (the Ring of Fire in Ontario and offshore wind in Nova Scotia and Newfoundland and Labrador),
- The Government will continue to work collaboratively with provinces, Indigenous partners, and other stakeholders to develop appropriate amendments to IAA, regulations, and practices.

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#### **What does this mean for existing and future projects?**

For now, proponents of projects that would have been subject to IAA controls as Designated Projects can proceed, subject to continuing obligations of other laws and the uncertainty of when/how a revised IAA may restore some additional federal oversight. Readers should note that the SCC decision has no effect on other federal authorities under more specific environmental laws (e.g., Canadian Environmental Protection Act), nor on provincial authorities such as Alberta's Environmental Protection and Enhancement Act (provincial plaintiffs in this case were, after all, seeking to protect their authorities from federal intrusion). 

#### **ABOUT JON ELLIOTT**

*Jon's multifaceted career spans consulting, managing compliance projects for organizations like Applied Materials and the City of Berkeley; writing, including the creation of legal handbooks and blogs, and contributions to 24 book-length resources for attorneys, EH&S managers, and trainers; and teaching, with a distinguished record of instructing courses and delivering presentations on EH&S compliance, earning him the "Outstanding Teacher" title in 1994. Jon has a diverse educational background, including a Juris Doctor from the University of California's Boalt Hall School of Law (1981), a Master of Public Policy from UC Berkeley's Goldman School of Public Policy (1980), and a Bachelor of Science in Mechanical Engineering from Princeton University (1977). He actively contributes to professional and community organizations, having served as Chairman of the Board of Directors of the GSPP Alumni Association and as a member of the Executive Committee of the State Bar of California's Environmental Law Section, where he chaired the Legislative Committee.*

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