



# AFN Impact Assessment Webinar Series

## Introduction

August 27, 2024 1-3pm EST

Assembly of First Nations Environment, Lands & Water Branch



# AFN Mandate on Impact Assessment

- Call on Canada to ensure that regulatory and policy development fully respects the constitutional and other legal obligations of the Crown to First Nations and standards set by the *United Nations Declaration on the Rights of Indigenous Peoples* ([Resolution 69/2018](#)).
- Call on Canada to engage in focused dialogue with First Nations to substantively identify, recognize, and engage the protocols, elements, and processes to conduct joint regulatory and policy drafting ([Resolutions 69/2018, 06/2019](#)).
- Call upon Canada to meet or exceed precedent set in development and eventual passage of the Species at Risk Act – full, direct, and unfettered participation of First Nations ([Resolution 73/2017](#)).



# AFN Mandate on Impact Assessment

- Continue to support and coordinate interventions and participation of First Nations, regional organizations, and provincial territorial organizations in the co-development process, including creating regionally specific processes to address specific concerns and support provisions as part of nation-to-nation relationships ([Resolutions 73/2017](#), [07/2018](#), [69/2018](#)).
- Advocate for adequate funding directly to First Nations for their full and effective participation ([Resolutions 73/2017](#), [07/2018](#), [69/2018](#), [06/2019](#)).
- Conduct regional information sessions to support First Nations, regional organizations, and provincial/territorial organizations in the process ([Resolutions 73/2017](#), [07/2018](#), [69/2018](#)).



# ***Impact Assessment Act (IAA)***

- First Nations participated actively in the policy development process for the *Impact Assessment Act* (IAA).
- IAA entered into force in August 2019. It repealed and replaced the Canadian *Environmental Assessment Act*, 2012.
- IAA outlines a process for assessing the impacts of major projects and projects carried out on federal lands or outside of Canada.
- The Impact Assessment Agency of Canada is responsible for conducting impact assessments under IAA.



# Supreme Court of Canada Opinion

- On October 13, 2023, the Supreme Court of Canada issued a split opinion finding that the majority of the IAA is unconstitutional.
- The Supreme Court of Canada found the IAA to be unconstitutional for two overarching reasons:
  - The “pith and substance” (i.e., the main purpose of the legislation) is not directed at regulating effects within federal jurisdiction; and
  - The scope of the defined term “effects within federal jurisdiction” does not align with federal legislative jurisdiction.





# AFN Recommendations

1. Seek opportunities to operationalize the UN Declaration;
2. Uphold Inherent Title, Aboriginal and Treaty rights;
3. Strengthen reference to First Nations' 'decision-making' in the context of Indigenous Co-Administration;
4. Avoid a restrictive understanding of "effects within federal jurisdiction";
5. Strengthen references to Indigenous knowledge;
6. Protect Indigenous knowledge systems and confidentiality (non-public disclosure);
7. Defer to First Nations' designation requests and ensure First Nations participation in designation decisions; and
8. Do not substitute for assessments with lesser standards.



# IAA Amendments

- The Government made amendments that can be categorized into two types: amendments to “fix” the issues identified by the SCC and amendments to make IAA more “efficient.”
- Amendments to make the IAA constitutional:
  - Heightened focus on adverse federal effects;
  - Defined effects within federal jurisdiction;
  - Decision to require an impact assessment; and
  - Final decision.
- Amendments to make the IAA more “efficient”:
  - Substitution;
  - Joint Review Panels; and
  - Time limits.



# Key First Nation Provisions

- Mandatory consideration of the impacts of a project on Indigenous rights both as part of the assessment and at the decision-making stage;
- Mandatory consideration and protection of Indigenous knowledge;
- Recognition of Indigenous governing bodies as “jurisdictions”;
- New opportunities for Indigenous led assessments;
- Prohibition on designated projects proceeding without approval under the IAA if they will have effects on Indigenous rights or interests; and
- Mandatory establishment of an Indigenous Advisory Committee.





# Alignment with UN Declaration

- IAA references the Government of Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in the preamble.
- *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) has come into force since the IAA.
- UNDA Action Plan
  - Government of Canada committed to develop mandatory assessment tools to determine if new or changes to laws and regulations are consistent with the UN Declaration. These have not been adopted.
  - APM 51 committed IAAC to implement the IAA in a way that aligns with the UN Declaration and lists certain means of doing do.



# IAA Inconsistencies with UN Declaration

- Article 26
  - IAA failure to give legal recognition and protection to First Nations lands, territories and resources in accordance with the laws, customs, traditions and land tenure systems of First Nations.
- Article 32
  - IAA does not require free, prior or informed consent of impacted First Nations in order for the Government of Canada to approve a project.
- Article 37
  - IAA provides mechanisms for cooperation and shared decision-making, but the fails to effectively implement those powers and share decision-making with First Nations in treaty territories.



# Discussion Questions

1. What are your priority concerns with the current impact assessment regime and process?
2. What changes should be made to the IAA, its regulations and policies, following the UN Declaration and UNDA?



# Substitution

- IAA amendments enable the Minister of Environment and Climate Change Canada (ECCC) and IAAC to substitute federal IA for other jurisdictions' environmental assessment or other processes.
- This is likely to be used to substitute federal IA for provincial assessment or regulatory approvals.
- Do these assessment and approval processes adequately include First Nations?



# First Nation Led Assessments

- Growing number of First Nation led assessments.
- First Nation led assessments can inform whether a community provides or withholds FPIC.
- IAA requires the federal impact assessment to consider First Nation led assessment along with other factors.
- Outstanding issue is adequate funding.
  - IAAC has indicated there is some funding available for “pilot projects” in First Nation led assessment on an ad hoc basis.



# Examples of First Nation Led Assessments

- Stk'emlúpsenc te Secwepemc Nation (SSN) conducted its own assessment of the Ajax Mine Project;
- Squamish Nation Process for the Woodfibre Liquified Natural Gas Plant and Export Terminal Proposal;
- Tsleil-Waututh Nation Assessment for the Trans Mountain Pipeline and Tanker Expansion Proposal;
- Mikisew Cree First Nation Culture and Rights Assessment for the Frontier Oil Sands Mine Project;
- Ktunaxa Nation Rights and Interests Assessment and the Fording River Operations Swift Coal Mine Expansion; and
- Kebaowak First Nation assessment of near surface disposal of nuclear waste at Canadian Nuclear Laboratories Chalk River site.





# Discussion Question

1. Has your First Nation done an Indigenous-led assessment of any project or group of projects?
2. Would you be interested in participating in dialogue to share experiences among First Nations?
3. Is there a need for a national network to facilitate these discussions?
4. What else would help support First Nations in conducting their own assessments?



# Regional Assessments

- IAA enables regional assessments (RA). Anyone can request a RA, Minister of ECCC must respond with reasons.
- Modern Treaty and Self-Governing First Nations may have authorities related to RAs.
- Other First Nations could be formal signatories to the RA if they entered into a Co-Administration Agreement.
- Two of five RAs completed or in progress were requested by First Nations. First Nations have requested many other RAs which were denied.
- First Nations have been hopeful that RAs could be a means to identify, prevent, and mitigate cumulative impacts on a regional level but necessary to assess experience to date to identify how effective these will be.



# Discussion Questions

1. Does your First Nation have any experience with regional assessments under the IAA?
2. Would you be interested in participating in dialogue to share experiences among First Nations with the regional assessment process and potential outcomes?
3. Is there a need for a national network to facilitate these discussions?
4. What else would help First Nations looking to be involved in regional assessments?



# Project List 5 Year Review

- The *Physical Activities Regulations*, also known as the Project List, is a regulation that sets out classes of “designated projects” that are subject to the IAA and may require a federal impact assessment.
- IAAC is required to review the Project List 5 years after it was adopted, and submit a report setting out conclusions and recommendations to the Minister of ECCC.
- IAAC Discussion Paper has been release for feedback.
- IAAC’s lens for review is “regulatory efficiency” but does not include an analysis of impact to First Nations Inherent or constitutionally protected rights or title.
- First Nations took issue with the original approach to the Project List and made many suggestions for project categories that should be included on the Project List.



# Assessment of Projects on Federal Lands and Exemptions

- Requirements for assessment of non-designated projects (not in the Project List) on “federal lands,” including reserves and protected areas, are set out in the IAA.
- Federal authorities must determine that “the project is not likely to cause significant adverse environmental effects” or that those significant adverse environmental effects are justified in the circumstances.
- Projects can be exempted from the “environmental effects determination” requirements if they are listed in the *Designated Classes of Projects Order* (Ministerial Order).
- Indigenous Services Canada administers the environmental effects assessments on reserve lands through the Environmental Review Process.
- Parks Canada administers the environmental effects assessment for lands it manages, including National Parks, National Wildlife Areas, National Marine Conservation Areas, National Historic Sites, and Historic Canals through their impact assessment process.



# Co-Administration of Federal IA

- Section 114 gives the Minister of Environment and Climate Change the power to enter into agreements to recognize Indigenous governing bodies as jurisdictions and authorize Indigenous governing bodies to exercise powers or perform duties or functions in relation to impact assessments in relation to specified lands.
- There is a self-imposed limitation that a regulation must be passed in order to recognize Indigenous Governing Bodies as jurisdictions for the purposes of the IAA. The regulation is being called the Indigenous Co-Administration regulation.
- IAAC is currently engaging on Indigenous Co-Administration and First Nations can provide feedback and recommendations to how the regulation and associated policies address co-administration.





# Discussion Questions

1. Has your First Nation or organization requested or received funding to engage on the Project List, Indigenous Co-Administration Agreements, and the Ministerial Exclusion Order?
2. What information do you require to fulsomely engage on the Project List, Indigenous Co-Administration Agreements, and the Ministerial Exclusion Order?
3. Do you intend to engage directly with the Impact Assessment Agency of Canada?



Thank you