

Backgrounder

Introduction to Assembly of First Nations Impact Assessment Webinar Series

August 2024

This document has been prepared for information purpose to set the stage for the Assembly of First Nations' impact assessment webinar series. First Nations' participation in the webinars does not constitute consultation nor fulfilment of the Crown's duty to consult and accommodate with First Nations in regards to any project or assessment and should not be construed as such.

BACKGROUND

The Government of Canada adopted the Impact Assessment Act (IAA)¹ as part of Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*; it came into force on August 28, 2019. The IAA replaced the *Canadian Environmental Assessment Act, 2012*² ("CEAA 2012") and put in place a new process for the federal government to identify, prevent, and mitigate the impacts of major projects. First Nations overwhelmingly participated in parliamentary and other advocacy related to IAA, demonstrating the importance of this legislation for First Nations. The Assembly of First Nations (AFN) made submissions with recommendations for the improvement of the IAA to the relevant House of Commons and Senate committees.³

On October 13, 2023, the Supreme Court of Canada issued an opinion in *Reference re Impact Assessment Act* ("SCC Opinion").⁴ A majority of the Court found most of the IAA and the underlying regulations to be unconstitutional because it was outside the scope of federal jurisdiction. In response to the SCC's Opinion, the Government amended the IAA through the *Budget Implementation Act, 2024*.⁵ Changes were made to sections of the IAA related to project designation, screening decisions, public interest decisions, definition of federal effects, substitution, and assessment by integrated panels.⁶ The AFN made a submission to the relevant Senate committee, recommending changes to the IAA to strengthen the act for First Nations.⁷

¹ *Impact Assessment Act*, S.C. 2019, c. 28, s. 1.

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

³ Assembly of First Nations, "Submission to the Standing Committee on Environment and Sustainable Development, Study on Impact Assessment Act, Canadian Energy Regulator, and Navigable Waters Act (Bill C-69)," (April 15, 2018) [online](#), and Assembly of First Nations, "Submission to the Senate Standing Committee on Energy, the Environment and Natural Resources, Study on Impact Assessment Act, Canadian Energy Regulator, and Navigable Waters Act (Bill C-69)," (April 4, 2019) [online](#).

⁴ *Reference re Impact Assessment Act*, 2023 SCC 23.

⁵ *Bill C-69, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on April 16, 2024*, S.C. 2024, c. 17 at Part 4, Division 28.

⁶ The Impact Assessment Agency of Canada has prepared a Fact Sheet on the amendments, which can be found [online](#).

⁷ Assembly of First Nations Technical Submission, "Amending the Impact Assessment Act in response to Reference re Impact Assessment Act, 2023 SCC 23" (May 2024) [online](#).

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.”⁸

Amendments to make the IAA Constitutional

1. Heightened focus on adverse federal effects:

Before	After
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 <u>mitigation</u> of significant adverse effects <u>within federal jurisdiction</u>
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, meeting Canada’s environmental obligations and climate commitments, and integrating science and Indigenous knowledge into decisions
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
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 adds some of the things removed from the purposes (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. Defined effects within federal jurisdiction (s. 2)

⁸ The Ministerial Working Group (MWG) on Regulatory Efficiency for Clean Growth Projects was established in 2023 to coordinate Government of Canada efforts to grow the clean economy, create an efficient regulatory framework to support the development of clean growth projects, help meet Canada’s net-zero commitments, and increase investor confidence. Ministers met throughout autumn 2023, looking at concrete ways to improve the Impact Assessment Act, and address the recent Supreme Court finding of unconstitutionality; enhance Indigenous partnerships and accommodations; increase collaboration with provincial, territorial and Indigenous jurisdictions; and increase coordination among federal departments in the regulatory approval process. The MWG report “Building Canada’s Clean Future: A plan to modernize federal assessment and permitting processes to get clean growth projects built faster” is available online: <https://www.canada.ca/en/privy-council/services/clean-growth-getting-major-projects-done/action-plan.html>. The resulting Cabinet Directive on Regulatory and Permitting Efficiency for Clean Growth Projects is also available online: <https://www.canada.ca/en/privy-council/services/clean-growth-getting-major-projects-done/cabinet-directive.html>.

Before	After
Included positive and negative effects Included effects of any magnitude Included all transboundary effects Did not include many federal effects (e.g., navigation)	Only adverse effects Only non-trivial effects Only a subset of transboundary effects: Marine pollution Pollution to trans-boundary waters Still does not include many federal effects

3. Decisions to require an IA (s. 9, 16)

Before	After
Designation power: Minister may designate if project may cause adverse federal effects	Designation power: Minister may designate if project may cause adverse federal effects, <u>adverse direct or incidental effects, or public concerns about federal effects warrant designation</u>
Screening decision: Agency decides whether an IA is required based on list of considerations, including potential for adverse federal effects	Screening decision: Makes potential for adverse federal effects a prerequisite for an assessment

4. Final decision (ss. 60-63)

Before	After
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 and the extent to which the federal effects are significant	Decision: Two steps: Minister or Governor in Council decides: a) Whether, <u>after mitigation</u> , the adverse federal, direct or incidental effects are likely to be to some extent significant, and the <u>extent to which they are significant</u> ; 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
Factors:	Factors: a) Impacts on Indigenous peoples and rights

a) Extent to which project fosters sustainability b) Extent to which federal effects are significant c) Mitigation d) Impacts on Indigenous peoples and rights e) Extent to which project helps or hinders Canada's ability to meet its climate commitments and environmental obligations	b) Extent to which the effects <u>contribute to</u> Canada's ability to meet its climate commitments and environmental obligations c) Extent to which <u>the effects</u> of the project contribute to sustainability
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Amendments to make the IAA more "efficient"

1. Substitutions (s. 31)

Before	After
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: A process for assessing the effects of designated projects; or An assessment process <u>in combination with any other activities</u> described in an agreement with the substituting authority

2. Joint review panels (s. 43.1)

Before	After
No power to establish joint review panels with provinces for projects regulated by the Canadian Nuclear Safety Commission (CNSC) or Canada Energy Regulator (CER)	Power to establish joint review panels with provinces for projects regulated by the CNSC and CER

3. Time limits (ss. 37, 65)

Before	After
Review panels: GiC could extend time limits for review panel reports any number of times	Review panels: GiC may only extend time limits for review panel reports <u>once</u>
Decision statement: GiC could extend time limits for final decisions any number of times	Decision statement: GiC may only extend time limits for final decisions <u>once</u>

ALIGNMENT WITH UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples Act* [UNDA Act] requires the Government of Canada, in consultation and cooperation with Indigenous Peoples, to take all measures necessary to ensure that federal laws are consistent with the UN Declaration on the Rights of Indigenous Peoples [Declaration].⁹ The UNDA Action Plan committed the Government to “[d]evelop and implement a process and further direction for federal government departments and agencies to ensure bills and proposed regulations are consistent with the *Declaration*” through measures such as “Cabinet directives or mandatory assessment tools on consistency with the *Declaration*.”¹⁰ Such measures have not yet been adopted.

See Backgrounder entitled “The Impact Assessment Act and the Declaration on the Rights of Indigenous People” for more.

SUBSTITUTION

The IAA amendments enable the Minister of Environment and Climate Change Canada (ECCC) and the Impact Assessment Agency of Canada (IAAC) to substitute federal impact assessment with a province, territory, or Indigenous Governing Body’s assessments or “processes”. This may be of concern to First Nations, given that not all provincial/territorial assessment or regulatory regimes are equal, particularly when it comes to how each may consider First Nations’ Inherent and Treaty rights and Title. First Nations should consider whether potential project effects can be effectively assessed and managed by provincial/territorial regulators and whether these processes adequately trigger and fulfil the Crown’s duty to consult with First Nations towards free, prior and informed consent.

INDIGENOUS-LED ASSESSMENT

There are a growing number of First Nations leading their own assessments of major projects in their territories.¹¹ First Nation-led assessments can inform whether a community provides or withholds free, prior and informed consent for a project and the IAA requires the federal impact assessment to consider them along with other factors.¹² Examples of First Nation-led assessments have been well documented and lessons articulated¹³ but there continues to be a

⁹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 at s. 5.

¹⁰ Government of Canada, “United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan” at page 25, [online](#).

¹¹ 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; Kebowak First Nation assessment of near surface disposal of nuclear waste at Canadian Nuclear Laboratories Chalk River site; etc.

¹² IAA at s. 22(q).

¹³ Jeff Nishima-Miller & Kevin Hanna, “Indigenous-led Impact Assessment, An Introduction: Case Studies and Experiences in Indigenous-led Impact Assessment” (2022) [online](#); Jeff Nishima-Miller, “The Tsleil-Waututh Nation Assessment” (2022) [online](#); Jeff Nishima-Miller, “The Stk’emlúpsenc te Secwepemc Nation Assessment Process” (2022) [online](#); Jeff Nishima-Miller, “The Squamish Nation Process” (2022) [online](#); Jeff Nishima-Miller, “The Ktunaxa Nation Rights and Interests Assessment” (2022) [online](#); Jeff Nishima-Miller, “The Mikisew Cree First Nation Culture

need for dialogue amongst First Nations to share lessons learned from these processes. One outstanding issue to be addressed is to need for adequate funding for First Nation-led assessments. IAAC has indicated there is currently a small amount of funding available for First Nation-led assessments through an Indigenous Leadership in Impact Assessment Pilot Project.

REGIONAL ASSESSMENTS

The IAA includes sections enabling regional assessments.¹⁴ Under the IAA, anyone can request a regional assessment and the Minister is required to respond to the request and post reasons for triggering or rejecting the assessment.¹⁵ The Minister of ECCC may establish a committee to conduct a regional assessment and if the regional assessment will include lands other than “federal lands” the Minister may enter into an agreement with other jurisdictions to establish a joint committee and must offer to consult and cooperate with other jurisdictions.¹⁶

While the committee conducting the regional assessment is required to take into account Indigenous Knowledge, First Nations largely are not currently considered “jurisdictions” in the context of federal IA so they would not be represented on the committee.¹⁷ First Nations could be considered jurisdictions for the purposes of IA and be represented on the regional assessment committee if they enter into a Co-Administration Agreement.

First Nations continue to gain experience with regional assessment under the IAA and may benefit from engaging with one another to share experiences and lessons. Two of the five regional assessments completed or in progress were requested by First Nations.¹⁸ First Nations have also requested other regional assessments, which the Minister has turned down.¹⁹ Most recently (February 8, 2024) the Beaver Lake Cree Nation submitted a formal request to the Minister of ECCC for a regional assessment of BLCN’s traditional territory in northeastern Alberta, focused on the potential cumulative impacts of oil and gas activities and related development.²⁰

CUMULATIVE EFFECTS ASSESSMENT

& Rights Assessment” (2022) [online](#); Kebaowek First Nation and Kitigan Zibi Anishinabeg, “Assessment of the Canadian Nuclear Laboratories Near Surface Disposal Facility and Legacy Contamination of Algonquin Aki Sibi” (June 2023) [online](#).

¹⁴ IAA at ss. 92-94.

¹⁵ IAA at s. 97.

¹⁶ IAA at s. 93 and 94.

¹⁷ Modern treaty and Self-Government First Nations may have powers, duties or functions in relation to environmental assessment of a designated project under a land claim agreement or federal or provincial legislation; these are already considered jurisdictions for the purposes of the IAA.

¹⁸ The Mohawk Council of Kahnawà:ke requested the Regional Assessment of the St. Lawrence Area, [online](#), and Aroland First Nation was one of three parties to request the Regional Assessment in the Ring of Fire Area, [online](#).

¹⁹ A group of First Nations and Metis communities requested a Regional Assessment for the Southwestern Alberta Foothills, but this was rejected by the Minister of ECCC, [online](#); The Salish Sea Indigenous Guardians Association made a request for a Regional Assessment of the Salish Sea, but this was rejected by the Minister of ECCC, [online](#). The Kainai and Siksika First Nations supported a request for a Regional Assessment of Coal Development and Exploration Activity in Southwest Alberta but this was rejected by the Minister of ECCC.

²⁰ Beaver Lake Cree Nation Letter to Minister Guilbeault, Re: Request for a Regional Assessment – Beaver Lake Cree Nation Traditional Territory (February 8, 2024), [online](#).

Much could be said about the need for cumulative effects assessments. First Nations' lawsuits asserting unjustifiable infringement of treaty rights due to cumulative effects of development through their traditional territories highlight the need for fulsome processes to identify, address, prevent and mitigate cumulative effects.²¹ Federal impact and environmental assessment processes²² have not been particularly useful in identifying, preventing and mitigating cumulative effects and so some First Nations have taken on developing their own cumulative effects assessments.²³ The Indigenous Centre for Cumulative Effects is one organization helping to support Indigenous communities to undertake cumulative effects work.²⁴

KEY ISSUES FOR INPUT TO IAAC ENGAGEMENT INITIATIVES

The Impact Assessment Agency of Canada has indicated they will review and update regulations, policies, procedures and guidance documents that need to be updated following amendment to the IAA. The Agency is moving forward with their review of the Physical Activities Regulation (Project List) and engagement on a proposed regulation and policy approach to enable Indigenous Co-Administration Agreements and changes to the existing Ministerial Exclusion Order.

Subject	Description	Government Engagement Materials	Timeline
5 Year Review of the Physical Activities Regulation (Project List)	Review of Project List regulation that sets out list of designated projects (categories and thresholds) that require federal assessment.	Discussion Paper	Comment period open July 30 – September 27, 2024 (2 months). Gazette of draft regulation with amendments expected Spring/Summer 2024.
Designated Classes of Projects	Proposed changes to list of projects on	Draft regulation in Canada Gazette I	Comment period open July 27 –

²¹ S. Duncanson, S. Sutherland, M. Peden, K Thrasher, "The Regulation and Litigation of Cumulative Effects of Indigenous Rights Following the Yahey Decision and Blueberry River First Nation Settlement and the Potential Effects on the Energy Industry" (2023) [online](#); Environmental Law Centre, "Cumulative Impacts on the Exercise of Treaty Rights: Lessons from the Blueberry River First Nation Decision and Agreement" [online](#).

²² Impact Assessment Agency of Canada, "Policy Framework for Assessing Cumulative Effects under the Impact Assessment Act" [online](#).

²³ Cumulative Effects Assessment for Kainai First Nation (2018), [online](#); Cumulative Effects Assessment for Sikska Nation (2018), [online](#).

²⁴ Indigenous Centre for Cumulative Effects [online](#).

Order (Ministerial Exemption Order)	federal lands, including reserves, that require impact assessment.		October 10, 2024 (2.5 months)
Indigenous Impact Assessment Co-Administration Agreements	Proposed regulatory and policy framework to enable the negotiation of agreements to allow Indigenous jurisdictions to exercise powers of federal impact assessment	Discussion Paper	Comment period open July 30 – October 28, 2024 (3 months)

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 adoption of the United Nations Declaration on the Rights of Indigenous Peoples Act?
3. Has your community done an Indigenous-led assessment of any project or group of projects? Would you be interested in participating in dialogue to share experiences among First Nations? Is there a need for a national network to facilitate these discussions? What else would help?
4. Do you or your community have any experience with regional assessments under the IAA? Would you be interested in participating in dialogue to share experiences among First Nations with the regional assessment process and potential outcomes? Is there a need for a national network to facilitate these discussions? What else would help?
5. 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?
6. What information do you require to fulsomely engage on the Project List, Indigenous Co-Administration Agreements, and the Ministerial Exclusion Order?
7. Do you intend to engage directly with the Impact Assessment Agency of Canada?