



Questions and Answers about Canada's Proposed New *Impact Assessment Act*

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Introduction to the New *Impact Assessment Act*

1. What is the new *Impact Assessment Act* (IAA)?

On February 8, 2018, the federal government tabled 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*.¹ Bill C-69 was passed by the House of Commons and sent to the Senate for review in June 2018.

Bill C-69 will replace the *Canadian Environmental Assessment Act, 2012* (CEAA 2012)² with the new *Impact Assessment Act* (IAA), replace the *National Energy Board Act* with a new *Canadian Energy Regulator Act* (CERA), and make modest amendments to the *Navigation Protection Act* (NPA).³

2. Why is the *Canadian Environmental Assessment Act, 2012* being replaced?

The new IAA has been tabled to satisfy the Minister of Environment and Climate Change Catherine McKenna's mandate to "review Canada's environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes."⁴ The Prime Minister issued Minister McKenna the mandate following an electoral campaign promise to "make environmental assessments credible again."⁵ In 2012, the federal government replaced the original *Canadian Environmental Assessment Act* with CEAA 2012, which applies to fewer than 10% of federally regulated projects, restricts what is considered and imposes timelines to ram decisions through, and shuts out members of the public who want to participate.⁶ Assessments under CEAA 2012 have led to numerous protests, lawsuits and ultimately delays as Indigenous peoples and the concerned public take to the streets and courts to have their voices heard on issues that matter to them.

3. How much consultation has informed the IAA?

Bill C-69 may be the most extensively consulted-upon environmental statute in Canadian history. In 2016, two expert panels traveled to more than 20 communities from coast to coast to coast, hearing from over 1,000 in-person participants including government, Indigenous,

¹ 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*, 1st sess, 42nd Parl, 2018.

² SC 2012, c 19, s 52.

³ This brief is concerned with the IAA: for information on the new CERA see <https://bit.ly/2EbdPEM>, and for information on the changes to the NPA see <https://bit.ly/2sNjpHg>.

⁴ Canada, Office of the Prime Minister, "Minister of Environment and Climate Change Mandate Letter," by Rt. Hon. Justin Trudeau, PC, MP, Prime Minister of Canada (Ottawa: November 2015), online: Government of Canada <<http://pm.gc.ca/eng/ministerenvironment-and-climate-change-mandate-letter>>.

⁵ Liberal Party of Canada, "Real Change: A New Plan for a Strong Middle Class" (2015) at 41: <https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>.

⁶ Anna Johnston, "Canada's Track Record on Environmental Laws 2011-2015" (CQDE & WCEL, 2015), 6-7: https://www.wcel.org/sites/default/files/publications/WCEL_EnviroLaw_report_med1pg_fnl.pdf.

industry, non-government organizations, scientists and other experts. A parliamentary committee reviewing the *Navigation Protection Act* received hundreds of briefs and heard from Indigenous, industry, environmental, municipal, academic and recreational witnesses.

Following receipt of the expert panel and committee reports, in 2017 the Government of Canada published a discussion paper⁷ outlining its proposed approach to the IAA and other environmental reforms, receiving hundreds of comments from the entire spectrum of sectors and jurisdictions.

Following the tabling of C-69, the House of Commons Standing Committee on Environment and Sustainable Development received 150 briefs and heard from 117 witnesses, including Indigenous peoples, industry and environmental groups. Amendments made to C-69 at committee stage reflect the balance of concerns and recommendations to the committee.

Throughout the review, Minister McKenna has engaged a [Multi-Interest Advisory Committee](#) comprised of equal representation from Indigenous, industry and environmental experts, as well as provincial and federal government officials and regulators, to provide recommendations on assessment reform. The MIAC has informed every stage of the review and development of the IAA through in-person meetings, phone calls and WebEx meetings.

4. What is the overall takeaway from the IAA?

In some ways, C-69 purports to introduce some sweeping changes to the practice of environmental assessment (EA) in Canada, while in other ways it maintains the basic current structure and approach. Perhaps foremost, it shifts away from traditional *environmental* assessment towards an impact assessment (IA)⁸ model that focuses on broader sustainability goals. The bill states that a purpose of impact assessment is to foster sustainability and requires the identification and assessment of a broader suite of positive and negative impacts, including environmental, social, economic, health and gender impacts.

Bill C-69 also introduces an “assessment planning phase” to facilitate multijurisdictional collaboration and early public engagement, and does away with the public participation “standing test” imposed by lifecycle regulators such as the National Energy Board. It sets out factors for the Minister of Environment or Climate Change (or Cabinet, as the case may be) to consider when making decisions, and requires decision-makers to provide detailed reasons for decision.

But in many ways, C-69 is a retrenchment of the status quo. Some improvements are discretionary, meaning that whether assessments will be any better under the IAA is largely up to the government bodies administering the Act. It maintains CEAA 2012’s “project list” approach, in which only projects listed in regulations or designated on a case-by-case basis by

⁷ Canada, Environmental and Regulatory Reviews Discussion Paper (June 2017), online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/proposed-approach/discussion-paper.html>.

⁸ Bill C-69 uses “impact assessment” rather than “environmental assessment” throughout when referring to assessments under the proposed *Impact Assessment Act*. Both impact assessment and environmental assessment (and their acronyms IA and EA respectively) are used in this brief; generally, attempts are made to use IA to refer to assessments under the proposed *Impact Assessment Act*.

the Minister are eligible for assessment. What is more, even “designated” projects do not *require* an assessment; rather, the Impact Assessment Agency will decide whether an assessment is necessary for designated projects.

While it removes the public participation standing test and says that meaningful public participation is a purpose of the Act, much of when and how participation opportunities will be offered is left to policy and to the discretion of assessment authorities – a practice that has historically resulted in standard-form engagement for most assessments.

Similarly, while it aims to promote collaboration with Indigenous jurisdictions and (thanks to amendments by the House of Commons committee) mentions the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁹ it does not require the government to obtain the consent of Indigenous authorities on any decisions – process or final. It introduces a new emphasis on regional and strategic assessment, but falls short of describing circumstances where they will actually be required or how their outcomes are to be applied. And while the Act replaces the “significance and justification” test set out in CEAA 2012, it fails to ensure that decisions make the greatest possible contribution to sustainability or are even explicitly justified. Instead, it sets out a “public interest” test that allows the Minister and Cabinet to approve a project without explicit justification, proof of sustainability or a legislated right of appeal.

Thus, while Bill C-69 purports to make significant changes to federal EA in order to achieve the government’s mandate, it falls far short of the mark of a truly “next generation” IA regime.¹⁰

5. How discretionary is the IAA?

The IAA is somewhat less discretionary than CEAA 2012. For example, it prescribes factors to consider when deciding whether a project is in the public interest instead of giving decision-makers broad discretion in determining whether a project will result in significant adverse effects and if so, whether those effects are justified in the circumstances. It also introduces factors to consider when determining whether an assessment is required and imposes conditions on when the Minister may approve a substituted assessment of another jurisdiction. These factors provide greater clarity to all parties about what is required in each circumstance.

However, as noted below, the IAA does not prevent the Minister or Governor-in-Council from approving a project that is unsustainable or that violates UNDRIP, nor does it ensure that participation will be meaningful or decisions based on the best available information and knowledge.

That said, it should be noted that the IAA is intended to apply broadly to a wide range of projects, including hydroelectric, mines, oil and gas facilities and pipelines, and in every province of the country. Discretion is necessary for the Act to have the flexibility required to be suited to

⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP], online: United Nations <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>> [UNDRIP].

¹⁰ See West Coast Environmental Law *et al.*, “Making the Mid-Term Grade: A Report Card on Canada’s Proposed New Impact Assessment Act” (2018), online: <https://www.wcel.org/publication/making-mid-term-grade-report-card-canadas-new-impact-assessment-act>.

different project types, involve different regulators, enable collaboration with other jurisdictions, foster reconciliation, tailor public engagement to fit the needs of communities, and ensure that all relevant information is considered while avoiding irrelevant information. Impact assessment is a planning tool, not a regulatory one.

Sustainability

6. What factors will be considered under the new IAA?

As the new title suggests, the IAA moves from reviewing only a project's biophysical environmental effects within federal jurisdiction, to considering a broad range of positive and negative environmental, social, economic and health impacts. Assessments must take into account cumulative effects, alternative means of carrying out projects, alternatives to them, and the extent to which a project contributes to sustainability and to Canada's ability to achieve its international environmental and climate change commitments.¹¹ Fostering sustainability is a purpose of the Act, and the Minister or Cabinet (as the case may be) must consider (among other things) a project's contribution to sustainability when deciding whether to approve a project.¹²

For the first time, federal assessment law will explicitly require the consideration of economic benefits, gendered impacts, climate change and Indigenous knowledge.

7. Does the IAA downplay economic benefits and jobs?

No. Economic benefits has always been a key feature of environmental assessment, but for the first time the IAA explicitly requires the consideration of all socio-economic factors, not just those related to environmental impacts.

Of course, proponents have always touted the economic benefits their projects would bring, usually featuring those benefits at the outset of impact statements when discussing the need for the project. Impact assessment is the process decision-makers use to weigh the benefits, impacts, risks and uncertainties of projects. Without understanding the project's benefits, decision-makers would be unable to determine whether the benefits outweigh the costs or even whether the project is needed at all.

The IAA recognizes the important interaction between economic, social and environmental sustainability by requiring assessments to consider socio-economic benefits such as jobs and contributions to the local, regional and federal tax bases.

8. Will the IAA stop unsustainable projects?

There are no assurances that the IAA will prevent unsustainable projects from being approved. While purporting to encourage ecological, social and economic sustainability, Bill C-69 allows for unsustainable decisions. The core project approval test is whether the project is in the public

¹¹ Bill C-69, *supra* note 1 at cl 1, s 22(1).

¹² *Ibid*, cl 1, s 63(a).

interest,¹³ rather than whether it will contribute to net sustainability. This public interest determination must be based on the assessment report and the following factors:

- (a) the extent to which the project contributes to sustainability;
- (b) the magnitude of any adverse effects;
- (c) mitigation measures that are ordered to be imposed;
- (d) impacts on Indigenous peoples and their constitutional rights; and
- (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.¹⁴

First, economic matters are an inherent component of the definition – and therefore consideration – of sustainability. Secondly, sustainability only forms part of the ultimate public interest determination. The Minister or Cabinet must also consider assessment reports, which will set out the project's socio-economic benefits, even if they are short-term, only enjoyed by a few, or do not accrue to the people who also have to bear the negative impacts.¹⁵ There is no barrier to giving economic benefits more weight than environmental impacts, and no prohibition against making decisions that would undermine sustainability.¹⁶

Also, while alternatives to the project must be considered during the assessment, decision-makers are not required to select the best option from among those alternatives for achieving the greatest amount of net benefits while minimizing negative effects. Similarly, while decision-makers must provide reasons for decision,¹⁷ they are not required to justify any adverse effects that will occur as a result, or show how – or even whether – trade-offs are justified in the circumstances. Without these safeguards, decision-makers will be able to continue the current practice of allowing significant environment harms, and keeping the public in the dark about how important decisions are reached.

Climate

9. Is there a climate trigger?

No, the IAA does not establish any kind of trigger for when a project requires an IA due to climate considerations. A consultation paper developed by the Government of Canada on revising the project list suggests that the “[p]otential for direct greenhouse gas emissions above a defined level” *could* be used to determine whether a project is on the list, but at the time of writing, the proposed new project list regulations have not been made public. The consultation

¹³ *Ibid*, cl 1, ss 60(1), 62.

¹⁴ *Ibid*, cl 1, s 63.

¹⁵ Other factors that decision-makers must consider are the magnitude of adverse effects, the implementation of mitigation measures, impacts on Indigenous peoples and their rights, and implications on Canada's environmental and climate change commitments: *ibid*, cl 1, s 63(b)-(e).

¹⁶ Bill C-69, *supra* note 1 at cl 1, s 63(a).

¹⁷ *Ibid*, cl 1, s 65(1).

paper also states that projects like in-situ oil sands facilities could be exempted where a jurisdiction (such as a province) has a greenhouse gas emissions cap in place.¹⁸

10. Does the IAA contain a climate test?

Partially. Climate effects are one of a long list of factors that must be “considered” in an assessment of a designated project. There is no legislated trigger for an assessment of projects on the basis of climate, but for designated projects, assessments must consider “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.”¹⁹ Also, when making a decision on whether a project is in the public interest, the Minister or Cabinet (as the case may be) must also consider the extent to which the project will hinder or help Canada’s ability to meet its climate change obligations and commitments.²⁰

While this articulation of how climate effects are to be considered is a clearer standard than the significance determination made under CEEA 2012, many questions remain as to what information will be considered and how a project’s contribution to Canada’s climate commitments will be determined. Moreover, meeting Canada’s climate change obligations is just one factor to consider in assessments; there is no barrier to approving a project that will significantly hinder meeting such commitments.

Roles and Responsibilities

11. What is the role of the Impact Assessment Agency?

Bill C-69 renames the Canadian Environmental Assessment Agency the Impact Assessment Agency of Canada (the Agency).²¹ Its duties include:²²

- a. To conduct or administer IAs (including regional IAs where directed by the Minister), and provide secretariat support to review panels
- b. To coordinate consultations with Indigenous peoples during assessments
- c. To promote cooperation with other jurisdictions
- d. To promote or conduct IA research
- e. To promote the quality and consistency of IA with the purposes of the IA Act
- f. To ensure compliance with the IA Act, and
- g. To develop IA policies and consult with Indigenous peoples on the development of that policy.

¹⁸ Government of Canada, “Consultation Paper on Approach to Revising the Project List” (2018) at 4, 7: https://s3.ca-central-1.amazonaws.com/ehq-production-canada/documents/attachments/9af3ad917d78fae44f4098f7cc79c50c43f2f06f/000/008/960/original/Consultation_Paper_on_Approach_to_Revising_the_Project_List.pdf?1520610193.

¹⁹ *Ibid*, cl 1, s 22(1)(i).

²⁰ *Ibid*, cl 1, s 63(e).

²¹ *Ibid*, cl 1, s 153(1).

²² *Ibid*, cl 1, s 155.

These duties largely mirror those of the Agency under *CEAA 2012*, with the exception of two new objects: coordinating consultations with Indigenous peoples, and development of policy.

As under *CEAA 2012*, the Agency is responsible for establishing project files, maintaining a registry of all information associated with impact assessments, including an internet site.²³ Also, the Minister may delegate any of his or her powers, duties or functions under the Act to an officer or employee of the Agency.²⁴

12. What is the role of the NEB, CNSC and offshore petroleum boards?

The proposed IA Act reduces the role of the NEB (renamed CER) and CNSC in assessments while expanding the role of the offshore boards. Projects regulated by the CER or CNSC that require an assessment will be automatically conducted by panels that are appointed by the Minister of Environment and Climate Change, regardless of the size of the project or scale of the impacts.²⁵ The Agency will act as the secretariat to the panels, which must comprise at least three members. At least one panel member must be appointed from a roster of members recommended by the CER or CNSC, and so may be members of those regulators.²⁶ The rest of the panel members must be appointed from the general roster of potential panel members. Panel members appointed from the regulators' rosters must not comprise a majority of panel seats and may not chair the panel.²⁷

IAs of projects regulated by the CER and CNSC are intended to streamline regulatory review processes; in other words, while the CER and CNSC will have to issue separate regulatory approvals for those projects, it is the intention of C-69 that proponents will not need to duplicate information or processes in order for proponents to obtain those licenses.²⁸

For projects regulated by the Nova Scotia and Newfoundland-Labrador offshore petroleum boards, the Agency will continue to be responsible for the assessment, as is the case under *CEAA 2012*. However, C-69 includes provisions that will come into force at a later date, upon the making of an order in council. These provisions would require projects regulated by the offshore boards to be assessed by review panels appointed by the Minister. Such panels must be comprised of at least five members, at least two of whom must be appointed from rosters on the recommendation of the offshore petroleum boards.²⁹ Panel members appointed from the offshore board rosters cannot comprise a majority of the panel, but unlike panels of CER- and CNSC-regulated projects, they can be the chair.³⁰

The consolidation of assessment authority under the Agency while maintaining the involvement of the regulators completes a trajectory begun in 2010: under the original *CEAA*, whichever federal department had primary responsibility over a project was the responsible authority.

²³ *Ibid*, cl 1, ss 104(3), 105-106.

²⁴ *Ibid*, cl 1, s 54(1).

²⁵ *Ibid*, cl 1, s 43.

²⁶ *Ibid*, cl 2, ss 43-50.

²⁷ *Ibid*, cl 44(4), 47(4).

²⁸ Personal conversation with the Bill C-69 drafting team; *ibid*, cl 1, ss 45-46, 48.

²⁹ Bill C-69, *ibid*, cl 2-8, 196(2).

³⁰ *Ibid*, cl 6-7, ss 46.1(4), 48.1(4).

Amendments to the Act in 2010 consolidated responsibility for comprehensive studies under the Agency, a move that had widespread approval. With the elimination of screening level assessments, CEAA 2012 established three responsible authorities for projects designated on the project list (some federal authorities still have assessment authority for projects on federal lands).

However, assessment processes by the NEB, CNSC and Agency varied dramatically in fundamental areas such as the scope of assessment, formality vs flexibility of process, ability for the public to participate, Indigenous consultation and engagement, rigour of evidence testing, transparency and even the very independence of the authorities themselves. Drawing on these lessons, by consolidating authority under the Agency while ensuring regulator involvement on panels, the IAA better ensures better assessment consistency, rigour and public trust without undermining the important role of the regulators.

13. Who will decide whether to approve projects, and how?

For assessments conducted by the Agency, the Minister will be the default decision-maker, although she will be able to refer decisions to Cabinet.³¹ For assessments by review panel, decisions will be made by Cabinet.³²

As noted above, both Ministerial and Cabinet decisions must be based on whether the project is in the “public interest,” having consideration of:³³

- a. The project’s contribution to sustainability,
- b. Magnitude of adverse effects,
- c. Implementation of any mitigation measures required as a condition of approval,
- d. Impacts on Indigenous groups and Indigenous rights, and
- e. The extent to which the project will help or hinder Canada’s environmental and climate commitments.

For all decisions, the Minister must issue public, detailed reasons for decision that demonstrate how the decision-maker considered the above-listed factors.³⁴ However, the Act will not require the Minister or Cabinet to justify how they reached the public interest determination, or justify the environmental and other trade-offs that resource development proposals usually entail. There are also no requirements for decisions to be consistent with UNDRIP (only to “consider” impacts on Indigenous rights recognized in Canadian law) or Canada’s international climate change commitments, to respect ecological thresholds, or otherwise ensure sustainability and lasting well-being.

The new IA Act does not include a right of appeal or dispute resolution methods (it is worth noting that the new *Canadian Energy Regulator Act* also established under C-69 does contain provisions respecting dispute resolution).³⁵

³¹ *Ibid*, cl 1, s 60(1).

³² *Ibid*, cl 1, s 61.

³³ *Ibid*, cl 1, s 63.

³⁴ *Ibid*, cl 1, s 65(2).

³⁵ *Ibid*, cl 10, s 73.

The new Act would allow the Minister to add, remove, or amend conditions of approval following the issuance of a decision statement.³⁶ This power would allow, for example, the Minister to amend a condition if a new technology becomes available, or to facilitate adaptive management if monitoring reveals effects that were not predicted. It would not allow the Minister to revoke an approval.³⁷

14. Does the IAA establish any new bodies?

Bill C-69 requires or enables the appointment of three committees that should provide helpful guidance and oversight in IA. Specifically, it:

1. Requires the Agency to establish an expert committee to advise it on issues related to IAs;³⁸
2. Requires the Agency to establish an advisory committee to advise it on the “interests and concerns” of Indigenous peoples in relation to assessments to be conducted under the Act;³⁹ and
3. Requires the Minister to establish a Minister’s Advisory Council to advise him or her on issues related to the implementation of the IA Act, and regional and strategic assessments.⁴⁰

While these committees are welcome, advice regarding regional and strategic assessments would be better coming from the expert (and Indigenous) advisory committees than from the Minister’s Advisory Council. The Council will likely be similar in constitution to the current Multi-Interest Advisory Committee, an interest-based committee intended to represent the perspectives of environmental, industry and Indigenous organizations, whereas the expert committee is intended to represent expert rather than interest-based perspectives.

In order for regional and strategic assessments to occur when needed, be conducted under strong terms of reference by panel members best able to represent environmental needs and uphold Indigenous law, be based on the best available science and Indigenous and community knowledge, and establish much-needed ecological limits, regional and strategic assessments should be guided by expert advice from both Indigenous and non-Indigenous experts.

It is not clear how Indigenous knowledge and issues will be considered in the expert committee.

What Gets Assessed

15. What will be assessed?

At this stage, it is hard to say. Bill C-69 largely maintains the CEAA 2012 approach to what receives an assessment. As with CEAA 2012, regulations will list “designated projects.”⁴¹ These

³⁶ *Ibid*, cl 1, s 68.

³⁷ *Ibid*, cl 1, s 68(2).

³⁸ *Ibid*, cl 1, s 157.

³⁹ *Ibid*, cl 1, s 158.

⁴⁰ *Ibid*, cl 1, s 117.

⁴¹ *Ibid*, cl 1, s 2.

regulations are currently being developed, and we do not know what kinds of projects, or how many, will be listed.

Designated projects must undergo an initial screening in a legislated “planning phase” (described below), following which the Agency would decide whether an IA is required.⁴² Factors the Agency must consider when determining whether an IA is required include the potential for adverse effects, impacts on Indigenous rights, public comments, and any relevant regional or strategic assessments that have been conducted, or studies or plans for the region.⁴³

Projects not on the project list may also be designated by the Minister, if he or she determines that potential adverse effects or public concerns warrant an assessment.⁴⁴ Anyone may request that a project be designated, and the Minister must respond, with reasons, within 90 days. Projects designated by the Minister are subject to a determination by the Agency that an assessment is required.

The IA Act also requires lesser environmental assessments of projects on federal lands and projects that occur outside of Canada that are either proposed or funded by the Canadian government, that do not appear on the project list. These lesser assessments offer little opportunity for public involvement and no requirements for Indigenous collaboration, although they must consider Indigenous and community knowledge, public comments, impacts on Indigenous rights, and mitigation measures.⁴⁵ The test for approval is whether the project would likely result in significant adverse environmental effects.⁴⁶ Where significant adverse effects are likely, Cabinet will determine whether they are justified in the circumstances.⁴⁷

How will assessments be conducted?

16. What is the assessment planning phase?

The IAA establishes a new assessment planning phase that would occur prior to the IA. The planning phase would be conducted by the Agency and commence when the proponent submits an “initial description of the project”, which the Agency must post on its internet registry.⁴⁸

The IA Act requires the Agency to engage the public, and to offer to consult with other jurisdictions (including Indigenous jurisdictions) and Indigenous groups who may be affected, during this phase.⁴⁹ Following this engagement, the Agency is required to provide the proponent with a summary of the issues with respect to the project that the Agency considers relevant, including issues raised by the public, a jurisdiction or an Indigenous group.⁵⁰ The proponent

⁴² *Ibid*, cl 1, s 16 (1).

⁴³ *Ibid*, cl 1, s 16(2).

⁴⁴ *Ibid*, cl 1, s 9(1).

⁴⁵ *Ibid*, cl 1, s 84.

⁴⁶ *Ibid*, cl 1, s 83.

⁴⁷ *Ibid*, cl 1, s 83(b).

⁴⁸ Bill C-69, *supra* note 1 at cl 1, s 10.

⁴⁹ *Ibid*, cl 1, ss 11-12.

⁵⁰ *Ibid*, cl 1, s 14(1).

must then notify the Agency of how it intends to address these issues and provide a detailed project description.⁵¹

Bill C-69 does not contain many details for the planning phase, and does not require the Agency to develop and publish any plans for the assessment. Most planning phase outcomes, such as plans for how the assessment should be conducted, how to collaborate with jurisdictions, or how to engage the public, will be established in policy or regulations.

17. Will the planning phase mean longer assessments?

No. The planning phase occurs before the assessment begins and is intended to overlap with the period of pre-assessment planning currently undertaken independently by proponents. The assessment itself will commence at the same time as assessments commence under CEAA 2012: when proponents submit a detailed project description.

18. Who gathers the information?

The proponent will still largely be responsible for most of the information-gathering and analysis. Following the conclusion of the planning phase, the proponent will be allowed three years to gather the information and conduct the studies that the Agency sets out in the notice of commencement.⁵² The Agency may extend this time limit by any period it considers necessary to conduct the impact assessment.⁵³ Once the Agency is satisfied that the proponent has provided it with all the necessary studies and information, the assessment may commence. The Agency may also decide to terminate an assessment if the proponent has not provided it with the necessary information.⁵⁴

Any person or jurisdiction may also provide information to guide the assessment, and every federal authority with specialist or expert information must make that information available to the reviewing body on request.⁵⁵

19. How will assessments by the Agency occur?

The Agency will be the responsible authority for most IAs. It must consider all information that is available to it in an assessment, and may require the collection of further information.⁵⁶ It must also ensure that the public is provided with an opportunity to participate in the assessment.⁵⁷ Following the assessment, the Agency will make a draft report available for public comment and then submit a final report to the Minister that describes the effects that are likely to be caused by the project.⁵⁸

⁵¹ *Ibid*, cl 1, s 15(1).

⁵² *Ibid*, cl 1, s 19(1).

⁵³ *Ibid*, cl 1, s 19(2).

⁵⁴ *Ibid*, cl 1, s 20(1).

⁵⁵ *Ibid*, cl 1, s 23.

⁵⁶ *Ibid*, cl 1, s 26.

⁵⁷ *Ibid*, cl 1, s 27.

⁵⁸ *Ibid*, cl 1, s 28.

20. Can there be assessments by review panel?

Yes. Within 45 days of the commencement of an assessment, the Minister may refer a project to a review panel if she determines that a review panel would be in the public interest,⁵⁹ and she must refer the assessment to a review panel if the project is regulated by the Canadian Energy Regulator or Canadian Nuclear Safety Commission.⁶⁰ Her determination must include a consideration of the extent to which effects of the project may be adverse, public concerns, opportunities to cooperate with other jurisdictions, and any adverse effects on the rights of Indigenous peoples.⁶¹

If a project is referred to a review panel, the Minister must appoint review panel members and establish the panel's terms of reference. Members must be unbiased, free from conflicts of interest regarding the project under review, and have relevant knowledge or experience.⁶² Review panel responsibilities will include conducting assessments, making all information publicly available, holding public hearings, and preparing and submitting reports to the Minister.⁶³

21. What factors must an assessment consider?

The IAA establishes a number of factors that an impact assessment must take into account, including:⁶⁴

- a. Direct, cumulative and interactive effects
- b. The effects of malfunctions or accidents
- c. Mitigation measures that are economically and technically feasible
- d. Impacts on Indigenous peoples
- e. The purpose of and need for the project
- f. Alternative means of carrying out the project, and alternatives to the project
- g. Indigenous and community knowledge
- h. The extent to which the project contributes to sustainability
- i. The extent to which the project hinders or contributes to Canada's climate change and environmental obligations
- j. Changes to the project caused by the environment
- k. The requirements of follow-up programs
- l. Effects on Indigenous cultures
- m. Public comments, and comments from other jurisdictions
- n. Any relevant regional or strategic assessments that have been conducted
- o. The intersection of sex and gender effects with other identity factors
- p. Any assessments by Indigenous jurisdictions

⁵⁹ *Ibid*, cl 1, s 36(1).

⁶⁰ *Ibid*, cl 1, s 43.

⁶¹ *Ibid*, cl 1, s 36(2).

⁶² *Ibid*, cl 1, s 41(1).

⁶³ *Ibid*, cl 1, s 51.

⁶⁴ *Ibid*, cl 1, s 22(1).

22. What does the requirement to assess gender mean, and why do it?

The IAA requires all assessments to consider “the intersection of sex and gender with other identity factors.”⁶⁵ This requirement is a recognition that the benefits and impacts of resource development can be experienced differently along gender lines, as well as along such other identity factors as age, race and cultural or religious background. This reality can be especially pronounced in rural communities and in particular, Indigenous communities, especially where resource projects are located relatively close to the communities. For example, impacts that women may disproportionately bear include increased housing costs due to pressures on housing availability, reduced access to health and social services that struggle to accommodate increased demand, increases in sexually-transmitted infections, teen pregnancy, sexual assault and human trafficking. Women also tend to not enjoy as many of the benefits of projects, such as the jobs. Impacts borne by the often mostly male workforce, especially with remote camps, include loneliness, depression and substance abuse caused by long hours and disconnection from one’s family and community.⁶⁶ These impacts can be exacerbated by such other identity factors as Indigeneity, age and disability.

These impacts are documented, not speculative, and we have the tools to help address them. It is not uncommon for assessments in Canada to consider gendered impacts and identify means of mitigating or avoiding them. Solutions may be proposed in conditions of approval, such as requirements for proponents to provide child care services for parent workers. Other solutions may involve local, provincial and federal authorities in providing access to necessary services and policing. But we need to first understand the issues before we can fix them. The requirement to consider the intersection of sex and gender with other identity factors formalizes an important and growing practice in Canada and is a major step forward.

23. Does the federal government have jurisdiction to consider broader health and social factors?

Yes. The Supreme Court of Canada has confirmed that when a federal official is exercising his or her authority, he or she may consider any socio-economic or environmental matters related to that exercise of authority. For example, if an assessment is required of a designated project under the IAA and the project requires an authorization under the federal *Fisheries Act*, the decision about whether the project is in the public interest necessarily entails weighing the broader impacts, benefits, risks and uncertainties before deciding whether the project should be approved and a *Fisheries Act* authorization issued. To say that the Minister or Cabinet should be able to consider the project’s socio-economic benefits but not its impacts or risks would be arbitrary and force decisions to be made with poor information.

⁶⁵ *Ibid*, cl 1, s 22(1)(s).

⁶⁶ The Firelight Group with Lake Babine Nation and Nak’azdli Whut’en, *Indigenous Communities and Industrial Development: Promoting Healthy Communities in Settings of Industrial Change* (February 2017), online: http://www.thefirelightgroup.com/firelightmaterials/wp-content/uploads/2016/03/Firelight-work-camps-Feb-8-2017_FINAL.pdf.

24. Will the expanded list of factors overload and lengthen assessments?

Likely no. The IAA allows the Agency or Minister (as the case may be) to determine the scope of factors to be taken into account in an assessment, which includes the ability to not include factors in the terms of reference if they do not appear to be relevant to the assessment.⁶⁷ In fact, a main purpose of the planning phase is to identify which issues are the most relevant to the assessment in order to focus attention on what really matters and avoid spending time and resources investigating irrelevant information. Thus, despite the increase in factors to be considered, if the IAA is implemented correctly assessments should become more focused and less cumbersome than under CEAA 2012.

25. Will the IAA reduce time limits?

Yes. Assessment planning phases must be conducted within 180 days, which the Minister may extend by up to 90 days.⁶⁸ Once assessments commence, assessments by the Agency must be completed within 300 days and assessments by review panel must be completed within 600 days,⁶⁹ although the Minister or Cabinet may extend these time limits.⁷⁰ These timelines are generally substantially shorter than those under CEAA 2012.

It should also be noted that the federal government has stated that it will enact new Information Requirements and Time Management Regulations under the IAA. Among other things, these regulations will prescribe the conditions under which the legislated timelines may be extended or paused. Depending on the content of the regulations, there may be considerably less discretion under the IAA to ensure that assessment timelines are long enough for meaningful review, public participation, Indigenous consultation and collaboration with other jurisdictions.

Public Participation

26. Does the IAA restrict who gets to participate in assessments?

No, there is no standing test or other restriction on who may participate in an assessment.

27. Will the removal of the standing test bog down processes and drown out the voices of those most affected?

No. It is important to remember that review panels have the authority to set the rules of procedure for hearings they hold, and they exercise that power in all assessments. The IAA requires that there be meaningful public participation, but there are many ways for people to participate meaningfully in an assessment, with new methods being developed as online technology advances. The IAA imposes mandatory timelines, and panels will be able to set rules

⁶⁷ *Ibid*, cl 1, ss 22(2).

⁶⁸ *Ibid*, cl 1, ss 18(1), (3).

⁶⁹ *Ibid*, cl 1, ss 28(2), 37(1).

⁷⁰ *Ibid*, cl 1, ss 28(5)-(7), 37(3)-(4).

of procedure to ensure hearings occur in a timely manner and ensure that the voices of those most impacted and interested and with subject-matter expertise are heard.

28. Will public participation be meaningful?

Meaningful participation is a goal of the Act,⁷¹ but whether this goal is achieved largely depends on policy and implementation. The Act does not define “meaningful,” or contain guiding principles or more than basic requirements respecting minimum standards of participation.

The public must be provided with an opportunity to participate in the planning phase.⁷² For Agency-led assessments, the public may participate in the assessment and comment on draft reports.⁷³ Review panels must hold public hearings, but the public is not guaranteed a right to comment on draft reports.⁷⁴ The Act does not require that the public be consulted on how they would like to participate, or require more than one opportunity to participate in assessments.

Also, while the IAA requires the Agency to establish a participant funding program for assessments and follow-up programs, it does not require the Agency to provide enough money to allow the public to participate meaningfully, and the funding program does not apply to substituted assessments, even if, for example, a substituted provincial process has no provision for participant funding.⁷⁵

For non-designated projects on federal lands or outside Canada that have a federal proponent or federal funding, the public is only afforded a 30-day comment period on the federal authority’s determination whether the project is likely to cause significant adverse environmental effects, and the authority may issue that decision on the 30th day – meaning decisions may be reached prior to the conclusion of the comment period.⁷⁶

Availability and Use of Information

29. Will all relevant information be available to the public?

Mostly, although the public may be required to request information rather than have it be automatically available online. The IAA requires the Agency to establish a project file for each designated project that contains all information that it receives in relation to that project’s assessment.⁷⁷ Those project files and an internet site will comprise the Canadian Impact Assessment Registry.

⁷¹ *Ibid*, cl 1, s 6(1)(h).

⁷² *Ibid*, cl 1, s 11.

⁷³ *Ibid*, cl 1, ss 27, 28(1).

⁷⁴ *Ibid*, cl 1, s 51(1)(c).

⁷⁵ *Ibid*, cl 1, s 75(1)-(2).

⁷⁶ *Ibid*, cl 1, s 86(1).

⁷⁷ *Ibid*, cl 1, s 106.

Not all information may appear on the internet site. In many cases, the Agency is only required to post a summary of the information, along with details about how to obtain a copy of the full information.

Also, the Act does not require that decision statements indicate the information on which decisions are based, or that this information be made publicly available. Nor does the Act require the Registry to contain all information provided to the Agency, or for the Agency to provide information without charge on request.

30. Will the Registry contain information about all federally-regulated projects?

No. The Registry must contain information only about designated projects, or projects that otherwise receive an assessment under the Act. Therefore, it appears that only a small percentage of projects that are federally-regulated, receive federal funding, or have federal proponents will appear on the Registry, retaining the current patchwork approach to environmental data.

31. How long will information about projects be available?

The Agency is only required to retain project information on the internet site until a project's follow-up program is complete.⁷⁸

32. Will decisions be based on science and Indigenous knowledge?

A purpose of the IAA is to ensure that assessments take into account scientific information and Indigenous knowledge,⁷⁹ and the Act implements some important measures to help ensure that science and Indigenous and community knowledge are taken into account (although we note that this falls short of requiring decisions to be *based* on science and Indigenous and community knowledge).

For example, Indigenous and community knowledge must be considered in assessments, and federal authorities in possession of specialist or expert knowledge must make that information available to assessment authorities, including for substituted assessments.⁸⁰ The Act also requires the Agency to establish an expert panel to advise it on scientific, as well as other, issues.⁸¹

However, the Act lacks assurances that assessments and decisions will be based on the best available scientific information, or on Indigenous and community knowledge. For example, the use of the best available scientific information and data is mentioned in the Preamble, but not required by the Act.⁸² There are no provisions respecting peer review, retaining experts independent of government or the proponent, or ensuring sufficient funding for participants to

⁷⁸ *Ibid*, cl 1, s 106(1).

⁷⁹ *Ibid*, cl 1, s 6(1)(j).

⁸⁰ *Ibid*, cl 1, ss 22(1)(g),(m), 23, 32(1)(b), 84(b)(c).

⁸¹ *Ibid*, cl 1, s 157(1).

⁸² *Ibid*, cl 1, Preamble.

do so. There is also no requirement that Indigenous knowledge be respected as an equally authoritative body of knowledge to western science.

Collaboration with other Jurisdictions

33. How will the IAA encourage the goal of “one project, one assessment”?

The Act’s preamble recognizes the importance of cooperating with other jurisdictions in assessments, and a purpose of the Act is to promote cooperation with provincial and Indigenous jurisdictions.⁸³ During an assessment planning phase and again during the assessment, the Agency is required to offer to consult with any jurisdiction that has powers, duties or functions respecting the project.⁸⁴

The ability to better tailor assessments to individual projects and circumstances, including through adjusting timelines, will likely foster collaboration, as it will allow the Agency to work with provincial and Indigenous jurisdictions to co-design assessments and thereby achieve the goal of one project, one assessment.

For most review panels, the Minister may enter into an agreement to jointly establish the panel with other jurisdictions; however, she is expressly prohibited from jointly establishing review panels of projects regulated by the CER, CNSC or offshore petroleum boards.⁸⁵ On the other hand, where a proposal is referred to the Minister under the *Mackenzie Valley Resource Management Act*,⁸⁶ the Minister must jointly appoint a review panel to conduct the assessment with the Mackenzie Valley Environmental Impact Review Board.⁸⁷

The Minister may also enter into agreements to collaborate on regional assessments.⁸⁸ However, there is no provision in the Act expressly authorizing the Minister to collaborate with jurisdictions on monitoring or follow-up.

34. Does the IAA facilitate collaboration with Indigenous peoples, and respect Indigenous authority?

Generally, the Act encourages the collaboration with Indigenous jurisdictions in the same ways that it encourages collaboration with provincial jurisdictions, and expressly states that cooperation with Indigenous peoples is a purpose of the Act.⁸⁹

⁸³ *Ibid*, cl 1, Preamble, s 6(1)(e).

⁸⁴ *Ibid*, cl 1, ss 12, 21.

⁸⁵ *Ibid*, cl 1, s 39.

⁸⁶ SC 1998, c 25.

⁸⁷ Bill C-69, *supra* note 1 at cl 1, s 40(2).

⁸⁸ *Ibid*, cl 1, s 93(1).

⁸⁹ *Ibid*, cl 1, s 6(1)(f).

However, it is important to note that the IAA restricts the definition of Indigenous jurisdictions to those established or recognized under Canadian law. Indigenous “jurisdictions” for the purposes of the IAA are:⁹⁰

- nations with IA powers, duties or functions under other federal laws or modern self-government agreements,
- co-management bodies established under land claims agreements recognized by the Canadian Constitution, and
- Indigenous governing bodies that have entered into an agreement with the Minister under the IAA once regulations for this purpose have been established.⁹¹

35. Does the IAA respect Indigenous rights and authority?

Somewhat. The Act’s preamble states the Government of Canada’s intention to implement UNDRIP, its purposes include respecting Indigenous rights, and it requires the consideration of Indigenous rights at various stages in assessments, including when deciding whether an assessment is required, when designating projects, and making decisions.⁹²

But the Act does not actually require implementation of UNDRIP, or mention the word “consent.” “Indigenous peoples of Canada” is narrowly defined to mean “Indians, Indian, Inuit and Métis” rather than by reference to their inherent jurisdiction and laws or UNDRIP.

Furthermore, as noted above, the IAA restricts the definition of Indigenous jurisdictions to those established or recognized under Canadian law.

Consulting with Indigenous peoples during the planning phase should help facilitate collaboration on assessments and decisions. However, the Minister is not required to seek to obtain the consent of relevant Indigenous authorities, or enter into government-to-government collaboration agreements on assessments. Therefore it is possible, but not a requirement, for the Minister to recognize and respect Indigenous authority over projects.

36. Does the IAA allow substitution, and if so, does it ensure substitution to the highest standard?

The IAA allows substitution of all assessments, except for those involving the CNSC, CER and offshore petroleum boards.⁹³ While it imposes some requirements on the Minister when deciding whether to approve a substitution, it will allow for substituted processes that are weaker than processes under the IAA.

To approve a substitution, the Minister must only be satisfied that the substituted process is “appropriate.”⁹⁴ Substituted processes must consider all the factors that must be considered under the IAA, allow federal authorities and the public to participate, consult Indigenous

⁹⁰ *Ibid*, cl 1, s 2, definition of “jurisdiction”, (f)-(g).

⁹¹ *Ibid*, cl 1, s 114 (1)(e).

⁹² *Ibid*, cl 1, s 6(1)(g), 9(2), 16(2), 22(c), 63(d), 84(a).

⁹³ *Ibid*, cl 1, s 31(1), 32.

⁹⁴ *Ibid*, cl 1, s 31(1).

peoples and allow for multijurisdictional collaboration, and provide public access to records and assessment reports.⁹⁵ Lower approval thresholds,⁹⁶ lack of public participant funding, fewer opportunities to participate, more restrictive timelines, and weaker information standards are some of the ways that substituted processes may not achieve the standards of an assessment under the IAA.

37. Does the IAA allow delegation?

Yes. The Agency may delegate any part of an Agency-led assessment of a designated project, including writing the report, to any jurisdiction as defined in the IAA,⁹⁷ except those of foreign states and international organizations.⁹⁸ Note, however, that the IAA creates a number of legal hurdles before Indigenous governing bodies may be considered jurisdictions for this purpose.⁹⁹

There is no limit on which aspects of an assessment the Agency may delegate, meaning that the Act seems to allow the Agency to delegate the entire assessment (but not the final decision) to another jurisdiction.

38. Does the IAA allow equivalency?

No, the IAA does not permit equivalency (which is substitution of both the assessment process and final decision).

Regional and Strategic Assessments

39. Does the IAA require regional and strategic assessments?

No, but the Act does enable regional (REA) and strategic (SEA) assessments. Any person may submit a request for a regional or strategic assessment to the Minister, and the Minister must respond to a request within a period of time to be prescribed in regulations.¹⁰⁰ Regional assessments may be done on federal lands, partly on federal lands, or outside federal lands.

40. How will REA and SEA be conducted under the IAA?

The Minister may appoint a committee, or direct the Agency, to conduct an REA or SEA, and must establish their terms of reference.¹⁰¹ For REAs on federal lands, partly on federal lands or

⁹⁵ *Ibid*, cl 1, s 33(1).

⁹⁶ In the IAA, it is whether the project is in the public interest, which includes a project's contribution to sustainability, whereas in many other jurisdictions the test is merely whether a project will result in significant adverse environmental effects, and whether those effects are justified in the circumstances.

⁹⁷ For example, the government of a province or co-management bodies established under land claims agreements.

⁹⁸ Bill C-69, *supra* note 1 at cl 1, s29.

⁹⁹ *Ibid*, cl 1, s 114(1)(e).

¹⁰⁰ *Ibid*, cl 1, s 97.

¹⁰¹ *Ibid*, cl 1, ss 92, 93, 95, 96.

outside federal lands, the Minister must offer to cooperate with any relevant jurisdictions, and may enter into a cooperation agreement for REAs partly on or outside federal lands.¹⁰²

The Act does not contain much detail respecting how REAs and SEAs are to be conducted. The assessment authorities (Agency or committee) must make all information it uses available to the public, provide the public with an opportunity to participate, and provide a report to the Minister when the assessment is completed.¹⁰³ There are no requirements regarding participation on REA or SEA terms of reference, no direction that REAs consider alternative scenarios for development and protection in a region, and no provisions requiring the application of REA and SEA outcomes in project assessment or regulatory decision-making (although REA and SEA outcomes must be *considered* in project-level assessments).¹⁰⁴

Monitoring, Follow-Up and Enforcement

41. What monitoring and follow-up will the IAA require?

Final decisions must include conditions related to mitigation and follow-up.¹⁰⁵ As noted above, the Agency must also keep follow-up records until the end of the follow-up period, and must make those records – or summaries of them – available on the internet site.¹⁰⁶

Otherwise, the Act does not contain details respecting monitoring or follow-up, or assign responsibility for ensuring they are done. There is also no requirement to evaluate follow-up programs, or that the results of follow-up or monitoring be made available following the completion of the follow-up program.

42. Will the public and Indigenous peoples be able to participate in monitoring and follow-up?

The IAA does not explicitly allow the public to participate in follow-up programs, or sit on follow-up committees, although it does not prohibit such public involvement, either. It does allow the Minister to enter into agreements with other jurisdictions respecting the carrying out of assessments,¹⁰⁷ but does not clarify whether those agreements may also be in respect of follow-up programs and monitoring. There is no explicit provision for the role of Indigenous peoples, including Indigenous guardians, in monitoring and follow-up.

43. How will the IAA be enforced?

The Act requires decision-makers to establish binding conditions of approval,¹⁰⁸ and establishes requirements on proponents, such as the requirement to comply with conditions of

¹⁰² *Ibid*, cl 1, ss 93(1), 94.

¹⁰³ *Ibid*, cl 1, ss 98, 99, 102.

¹⁰⁴ *Ibid*, cl 1, s 22(1)(p).

¹⁰⁵ *Ibid*, cl 1, s 64(4).

¹⁰⁶ *Ibid*, cl 1, s 105(2)(e).

¹⁰⁷ *Ibid*, cl 1, ss 114(d)-(f).

¹⁰⁸ *Ibid*, cl 1, s 64.

approval.¹⁰⁹ Where a proponent has contravened a provision of the Act, an enforcement officer may investigate, issue a notice of non-compliance, or order the proponent to take or stop an action.¹¹⁰

Proponents that contravene the Act or conditions of approval may face fines of up to \$600,000 for individuals, \$4,000,000 for small businesses, or \$8,000,000 for larger businesses.¹¹¹

However, the Act does not impose consequences on proponents for providing false information or inaccurate predictions about effects. Therefore, there may be no way to hold proponents accountable under the law for incorrect information or predictions that they provide. In particular, the IAA contains no legal mechanism for an IAA approval to be revoked if monitoring indicates that adverse effects will be greater than anticipated or mitigation measures are ineffective, although conditions may be amended.¹¹²

¹⁰⁹ *Ibid*, cl 1, s 7(3)(b).

¹¹⁰ *Ibid*, cl 1, ss 122-28.

¹¹¹ *Ibid*, cl 1, s, 144.

¹¹² *Ibid*, cl 1, s 68(2).

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