



AFN Impact Assessment Webinar Series
Enabling Indigenous Co-Administration of Federal Impact Assessment

September 17, 2024 1-3pm EST

Assembly of First Nations Environment, Lands & Water Branch



Introduction

Indigenous Co-Administration Agreements present a new and unique opportunity for First Nations.

- The *Impact Assessment Act* sets out powers for the Minister of Environment and Climate Change to enter into agreements to consider Indigenous governing bodies as jurisdictions under the Act and to authorize Indigenous governing bodies “to exercise powers or perform duties or functions in relation to impact assessments”.
- In order to exercise those agreement making powers, the Government of Canada must first pass regulations specifying how the legislative powers may be exercised.
- Participating in the Impact Assessment Agency of Canada consultations and offering comments on the discussion paper provides an opportunity to help shape the regulations and the policy framework.



What's at stake?

- First Nations have assessed the impacts of development within First Nations territories since time immemorial. Major projects present significant opportunities for First Nations economic empowerment but also have significant impact on First Nations land, air and waters.
- The displacement of First Nations authority over the land and the failure to recognize First Nations governance systems has limited the capacity and opportunity for First Nations to evaluate and respond to projects proposed within First Nations territories.
- Co-Administration Agreements are a potential tool for First Nations to exercise greater influence and authority.



“Be realistic, Acknowledge that it’s under Canada’s system. But this is another tool to exercise self-determination; a step forward in decolonization.”

Taiiaike Alfred (Kahnawá:ke Mohawk)

Circle of Experts



Purpose

- The purpose of this in camera discussion is to seek your feedback, guidance and input on the positions put forward by the Impact Assessment Agency of Canada to support the development of a technical submission by the Assembly of First Nations.



Proposed Approach

1. Review requirements for Indigenous Co-Administration Agreements
2. Review key points from the discussion paper
3. Review and discuss the questions set out in the backgrounder and use Mentimeter to provide additional feedback
4. Open dialogue on priorities and objectives for the Assembly of First Nations technical submission



Requirements

- To qualify to enter into an Indigenous Co-Administration Agreement, First Nations governing bodies would need to meet the requirements below:
 - Be a “council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35”
 - Identify the specific lands to which the IAA would apply
 - Identify the powers, duties and functions that the First Nation would exercise
- Determining how to assess eligibility, the scope of specified lands and the specific duties, powers and functions that could be exercised are all important parts of the present consultation process.
- Ultimately, co-administration agreements would need to meet the Co-Administration Agreement Regulations and be subject to agreement by the Minister of Environment and Climate Change.



Key Points from the Discussion Paper

- Co-administration agreements would not be project specific (p.7)
- Co-administration agreements would not be mandatory (p.9)
- The Agency has confirmed that Indigenous governing bodies could adopt their own approaches to implementation while meeting the legal requirements of the IAA and the regulations (p.9)
- Decisions by Indigenous governing bodies could be subject to litigation (p.9)
- The Agency is of the view that the final determination would rest with the Minister or Governor in Council in most cases (p.10)
- Co-administration agreements would be publicly posted (p.10)



Key Points (cont'd)

- The Agency and the Circle encourage Indigenous Governing Bodies to focus on aspects that carry the most discretion and influence over process and final outcomes (p.11)
- Co-administration agreements would not directly permit the Minister to authorize an Indigenous governing body to undertake federal assessments under separate Indigenous legal systems (p.15)
- Subject to regulations and co-administration agreement regulations, there could be flexibility around how powers are executed – Indigenous jurisdictions could establish their own policies and procedures to guide implementation (p.20)



Key Points (cont'd)

- Indigenous governing bodies that enter into co-administration agreements may become formal signatories to regional assessments (p.29)
- The Indigenous jurisdiction or IAAC could undertake consultations with section 35 rights holders – depending on the terms of the agreement – while keeping in mind that the Crown is ultimately responsible for ensuring that the duty to consult and accommodate is fulfilled (p.37)
- Both technical and governance capacity will be important to successfully negotiate and implement co-administration agreements (p.52)



What a Co-Administration Agreement Can and Cannot Do

Table 2: What a Co-Administration Agreement Can and Cannot Do

An Agreement Can:	An Agreement Cannot:
<ul style="list-style-type: none">▪ Authorize an Indigenous governing body to exercise legal powers, duties or functions related to impact assessments under the IAA▪ Require the parties to follow certain processes and/or meet requirements related to their own conduct and responsibilities▪ Provide direction on how the parties will exercise powers, duties and functions related to impact assessments▪ Provide that an Indigenous governing body is considered to be a jurisdiction for the application of the IAA on the lands specified in the agreement	<ul style="list-style-type: none">▪ Authorize powers, duties and functions that do not already exist in the IAA▪ Contradict the requirements of existing Canadian laws▪ Establish a process or requirements that would be inconsistent with existing Canadian laws▪ Impose requirements or prohibitions on third parties (e.g. proponents) that are outside the scope of the IAA▪ Authorize an Indigenous governing body to make IAAC's decision as to whether an impact assessment is required under section 16 of the IAA, nor to carry out post-decision activities such as follow-up, monitoring or enforcement



Exclusions

- Indigenous governing bodies that are not authorized to act on behalf of an rights holding Indigenous groups
- The exercise of powers, duties and functions outside of specified lands (statutory)
- Ministerial discretionary designations under section 9 of the *Impact Assessment Act* (Agency position)
- Decisions regarding whether an impact assessment of a designated project is required (statutory)
- Post decision phase authorities (i.e. follow up, monitoring, compliance and enforcement) (Agency position)



Enabling Regulations

The Agency has proposed developing regulations that are more enabling in nature than prescriptive with the majority of detailed criteria and processes to be spelled out in policy (p.11)

The Assembly of First Nations proposes to support this approach for the following reasons:

1. **Faster** – Earlier promulgation minimizes the risk of missing the opportunity to advance First Nations led assessments due to a change in government.
2. **Broader scope** – Enabling regulations are less likely to limit the scope of First Nations participation.
3. **Policy evolution** – Policies are easier to change than regulations allowing for evolution over time.



Specified Lands

The *Indigenous Co-Administration Agreement Regulations* will require agreements to identify specified lands over which agreements would apply.

Question: How should First Nations approach policy submissions to the Government of Canada relating to the delineation of First Nations territories?



Capacity Limitations

- Question: Do you have any recommendations for how to address community capacity limitations in the submission from the Assembly of First Nations?



Powers, Duties or Functions

- Question: What powers, duties or functions should be included in the Co-Administration Agreement Regulations for Indigenous Governing Bodies to exercise?



Designation Decisions

- Question: Should s. 9 designation decisions be available to Indigenous Governing Bodies under Co-Administration Agreements?



Self-Assessment & Advisory Body

- Question: What do you think about the suggestion of an Indigenous Advisory Body to verify self-assessment and make recommendations to IAAC and the Minister about Indigenous Governing Bodies' eligibility?



Substituted Processes

- Question: If the Government of Canada were to enter into an substitution agreement with a non-Indigenous jurisdiction (i.e. a province) what role should Indigenous governing bodies play in the substituted impact assessment process?



Duty to Consult and Accommodate

- Question: If an Indigenous Governing Body elects to enter into an agreement with the Minister of Environment and Climate Change to co-administer an assessment, how can we protect the rights and interests of First Nations in relation to the duty to consult and accommodate?



Next Steps

Agency Submission Deadline: October 28, 2024.
The Agency will then prepare a “What We Heard” Report

Figure 1: Potential Steps Towards Development of Regulations and Supporting Policy.





Open Discussion

- Are there any other topics that we should discuss?



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