

Regulatory Initiatives under the *Impact Assessment Act*

ASSEMBLY OF FIRST NATIONS INTRODUCTORY SESSION – AUGUST 27TH, 2024



Impact Assessment
Agency of Canada

Agence d'évaluation
d'impact du Canada

Canada



Agenda

- Background on the *Impact Assessment Act* and recent amendments
- Introduction of regulatory initiatives
 - Potential Indigenous Impact Assessment Co-Administration Agreement Regulations
 - Review of the *Physical Activities Regulations* (the “Project List”)
 - Amendments to the *Designated Classes of Projects Order* (Ministerial Exclusion Order)
- Next steps



Overview of the *Impact Assessment Act*

- The *Impact Assessment Act* (IAA) and its regulations establish the legislative basis for federal impact assessment in most regions of Canada.
- Outlines a process for assessing the impacts of major projects, listed in the *Physical Activities Regulations*, and projects carried out on federal lands or outside of Canada.
- Planning and decision-making tool used to assess positive and negative environmental, economic, health, and social effects of proposed projects, including impacts to Indigenous groups and rights of Indigenous peoples.
- Indigenous participation is an essential part of an open, informed and meaningful impact assessment process.
- The integration of Crown consultation and Indigenous participation in impact assessments supports the Government's commitment to reconciliation by providing tools for effective and meaningful participation, collaboration, and partnership with Indigenous peoples.

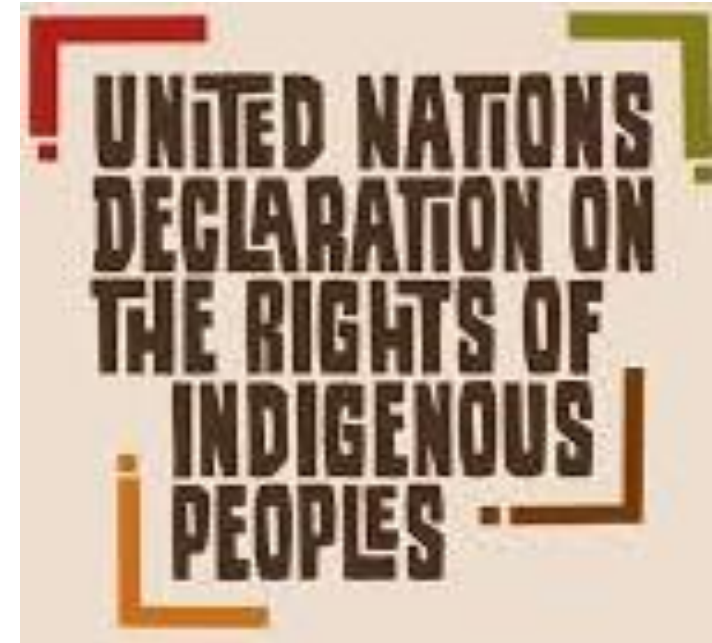


IAA Amendments

- In October 2023, the Supreme Court of Canada issued a decision that the Act was partially unconstitutional and must focus on areas of federal jurisdiction.
- Decision underscored the need for federal and provincial governments to work together towards cooperative federalism.
- On June 20, 2024, an amended IAA came into force. Highlights:
 - Decision-making provisions, namely the designation decision, screening decision, and final decision are now clearly based on preventing or mitigating adverse effects in areas of federal constitutional responsibility
 - Definition of “effects within federal jurisdiction” clearly corresponds to areas of federal jurisdiction under the Constitution
 - Enhanced opportunities for efficiency and reliance on, and cooperation with, other jurisdictions
 - Transitional provisions ensure continuity for proponents who chose to advance their projects during the interim period

UN Declaration remains integral

- The IAA continues to explicitly confirm the Government of Canada's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* and to ensure that the rights of Indigenous Peoples are respected throughout federal assessments.
- Amendments do not impact legislative provisions respecting meaningful engagement and participation of Indigenous Peoples in the assessment process.
- Continued requirement to consider and protect Indigenous Knowledge and to consider any study or assessment provided by an Indigenous governing body.



AMENDMENTS TO THE IMPACT ASSESSMENT ACT

	PREVIOUS	COURT'S DIRECTION	CHANGE
PROJECT DESIGNATION (S. 9, S. 109(b))	Designated projects are subject to the IAA either by: 1. Inclusion on the Project List (<i>Physical Activities Regulations</i>); or 2. Discretionary designation by Minister if there are potential adverse federal effects OR public concerns about effects. Intended for exceptional circumstances only.	Project designation must be based on the potential for adverse federal effects.	<ol style="list-style-type: none"> The Project List remains in effect, but regulation-making provisions ensure only projects with potential non-negligible adverse effects in federal jurisdiction will be included¹. The Minister cannot designate unless there is potential for non-negligible adverse federal effects. If so, other factors can be considered in whether designation is warranted: <ul style="list-style-type: none"> other existing federal or provincial processes that could address the potential adverse federal effects impacts on Indigenous rights, etc.
SCREENING DECISION (S. 16)	<p>The Agency decides whether an impact assessment is required based on a list of equally weighted factors:</p> <ul style="list-style-type: none"> potential for adverse federal effects information provided by proponents, Indigenous groups and the public in the planning stage <p>The timing of the screening decision can only occur after the Detailed Project Description is complete.</p>	Potential for adverse federal effects is a precondition, with consideration of other factors informing whether to proceed with a full impact assessment.	<p>The Agency cannot require an impact assessment unless it is satisfied that the carrying out of the designated project may cause non-negligible adverse federal effects. If so, other factors can be considered to determine whether an assessment is warranted, e.g.:</p> <ul style="list-style-type: none"> other existing federal or provincial processes that could address the potential adverse federal effects impacts on Indigenous rights, etc. <p>The timing of the screening decision can happen after the proponent has responded to the Summary of Issues; a Detailed Project Description is requested only if more information is needed for a decision.</p>
PUBLIC INTEREST DECISION (S. 60-63)	<p>Minister or Governor in Council must decide whether adverse effects within federal jurisdiction are in the public interest. The decision requires consideration of numerous equally weighted factors that are outside federal jurisdiction.</p> <p>Time limit extensions for the Governor in Council to issue a decision statement can be made multiple times for any reason.</p>	The final decision, including conditions or a permanent prohibition, must be based on significant adverse federal effects. Other non-federal factors cannot be used to exacerbate the federal effects but may inform the positive side of the ledger in determining whether to allow effects. Governor in Council time limit extensions must not allow for indefinite prohibitions.	<p>Decision-making is clearly focused on prevention of adverse effects in federal jurisdiction.</p> <p>The Minister or Governor in Council must first determine whether there are likely significant adverse federal effects, and the extent to which those effects are significant after taking into account mitigation measures. Then they determine whether any significant adverse federal effects are justified in the public interest considering, e.g.: impacts on Indigenous rights and positive and negative effects on Indigenous Peoples; the positive contribution of the project to sustainability, including economic benefits; and the contribution of the project to meeting Canada's climate objectives.</p> <p>Time limit extension by the Governor in Council can be done once for a definite period, with reasons posted on the Canadian Impact Assessment Registry.</p>
DEFINITION OF FEDERAL EFFECTS (S. 2)	"Effects within federal jurisdiction" includes any change to components of the environment, including any transboundary change to the environment, and any change to the conditions of Indigenous Peoples.	Effects must be linked clearly to federal matters under the constitution, including only those transboundary effects where federal jurisdiction has been established. Appropriate thresholds must apply to ensure prohibitions do not apply to trivial effects or positive changes.	<p>"Adverse effects within federal jurisdiction" include "non-negligible adverse changes" to federal aspects:</p> <ul style="list-style-type: none"> for provincial activities (mines, provincial roads, electricity), this includes fish and fish habitat, aquatic species at risk, migratory birds, transboundary water and marine pollution, and impacts on Indigenous Peoples for federal activities (interprovincial, nuclear, certain ports, rail), effects include broader environmental and socio-economic effects
COOPERATIVE FEDERALISM (S. 31-35, S. 43.1)	<p>Substitution: The Minister can substitute the whole of a process to another jurisdiction, save the final decision, when all requirements of the IAA are met by that jurisdiction's process.</p> <p>Assessment by Integrated Panels: Lack of clarity regarding mechanisms for other jurisdictions to participate in the integrated assessment of nuclear or pipeline projects.</p>	The federal and provincial governments have a role in project impact assessments, underscoring the importance of exercising respective powers in the spirit of cooperative federalism. While promoting "one project, one assessment," the current substitution provisions practically ensure that the "one assessment" will be federal.	<p>Substitution: The Minister can substitute a process, in whole or in part, to another jurisdiction when requirements would be met <u>between the jurisdictions</u>, allowing for a harmonized process for the best placed jurisdiction to undertake aspects of the assessment. Final decision-making remains with each jurisdiction.</p> <p>Assessment by Integrated Panels: Clarity that jurisdictions may participate in integrated review panels to assess nuclear or pipeline projects.</p>

¹ The public consultation process to review and amend the Project List (*Physical Activities Regulations*) will continue now that legislative amendments are in force.



A new tool in the collaboration toolbox

- 114 (1) (d) and (e) of the IAA
 - Authorizes the Minister to enter into agreements with Indigenous governing bodies and other bodies to take on certain powers, duties and functions under the IAA on lands specified in the agreements.
 - Under these agreements, Indigenous governing bodies would be considered jurisdictions for the application of the IAA.
- Before entering into these agreements, regulations must be in place.
- Agreements would be **optional**, long term, not project-specific.
- Would bring greater certainty about Indigenous jurisdictions' roles in future IA processes.
- In practice, **shared decision-making** most likely to occur at key points throughout the impact assessment process.
- Timelines and processes under the IAA would still be mandatory.



Review of the Physical Activities Regulations (the Project List)

- IAAC is reviewing the Physical Activities Regulations, commonly known as the Project List, which identifies the types of activities that are “designated projects” and therefore subject to the IAA
 - Objective to ensure continued focus on projects with the greatest potential for federal effects and where federal impact assessments would add value over other federal and provincial processes
- Review will also ensure that the Project List is consistent with UNDRIP and UNDA
- Using the 2019 List as a baseline, the review focuses on:
 - alignment with the 2024 amendments to the IAA;
 - IAAC experience in implementing the IAA and expert advice of federal departments;
 - changes that may merit targeted adjustments to thresholds or project types (e.g., emerging sectors, changes in technology or regulatory environment); alignment of definitions or clarification of terms (i.e. technical changes);
 - stakeholder and Indigenous feedback; and
 - alignment with Government’s clean growth agenda
- We are inviting your feedback on a Discussion Paper by Sept 27, 2024



Amendments to the Designated Classes of Projects Order

- Sections 81 to 91 of the IAA set out requirements for non-designated projects on federal lands or outside Canada (separate from impact assessment requirements)
- The Order excludes classes of these projects with only insignificant adverse environmental effects, from requiring a determination about environmental effects (*subject to certain limiting conditions*)
- Current Order excludes about 50 routine, straightforward project classes, including smaller buildings, lighting systems, fences, and telecommunication lines
- Proposed amendments add some new project classes that have only insignificant environmental effects and make other adjustments for clarity.
- Text of amended Order and Regulatory Impact Analysis Statement posted on *Canada Gazette Part I* website for comment until October 10, 2024 ([link](#))



Next Steps



Regulatory Initiatives Sessions

- September 3rd 1:00pm-3:00pm EST -Physical Activities Regulations : 60-day comment period from July 30th to September 27th.
- September 10th 1:00pm-3:00pm EST - Designated Classes of Projects Order: Published in CGI for a 75-day comment period, from Saturday, July 27th to October 10th.
- September 17th 1:00pm-3:00pm EST Indigenous Impact Assessment Co-Administration Agreements : 90-day comment period from July 30th to October 28th.



Contacts

- Indigenous Impact Assessment Co-administration Regulations
 - indigenouspolicy-politiquesautochtone@iaac-aeic.gc.ca
- Review of the *Physical Activities Regulations* (the “Project List”)
 - regulations-reglements@iaac-aeic.gc.ca
- Designated Classes of Projects Order
 - regulations-reglements@iaac-aeic.gc.ca





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