

Backgrounder
Indigenous Co-Administration Agreement Regulations
September 2024

This document has been prepared for information purposes to support discussions with First Nation representatives to inform the Assembly of First Nations' technical submission on Indigenous Co-Administration of federal impact assessment. These discussions do not constitute consultation nor fulfilment of the Crown's duty to consult with First Nations and should not be construed as such.

BACKGROUND

The *Impact Assessment Act* (2019) empowers the Minister of Environment and Climate Change to enter into agreements with Indigenous Governing Bodies to authorize those entities to exercise powers or perform duties or functions in relation to impact assessments under the *Impact Assessment Act*. These agreements will enable Canada and First Nations to formally share governance and decision-making at key points throughout the impact assessment process.

Before entering into a co-administration agreement, regulations must first be in place. The Impact Assessment Agency of Canada (IAAC) has released a discussion paper co-developed by IAAC and a Circle of Experts, a sub-committee of the Agency's Indigenous Advisory Committee, to open dialogue in relation to these new tools. During consultations, First Nations will have the opportunity to comment on the Discussion Paper and offer input into the development of future Indigenous Co-Administration Agreement Regulations.

CO-ADMINISTRATION AGREEMENTS

The powers that may be included in a co-administration agreement with First Nations are fairly broad. While the *Impact Assessment Act* restricts the Minister of Environment and Climate Change from entering into an agreement which would empower an Indigenous jurisdiction to decide whether an assessment would or would not be required, other decision-making powers may be included. Co-administration agreements will have to uphold Canadian laws and will only authorize the exercise of federal powers, duties and functions that already exist in the legislation. The assessments, or parts of assessments, that may be conducted under a co-administration agreement will have to align with the requirements of the *Impact Assessment Act*, including meeting both the process and timelines. The agreements must also specify the lands over which the agreements would apply and set out the specific powers, duties and functions that may be exercised by First Nations.

KEY ISSUES AND OPPORTUNITIES

Co-administration agreements provide new opportunities for First Nations to exercise greater influence over the processes and decision-making associated with federal impact assessments. However, in order for the regulatory framework to be successful, it must meet not only the requirements of the *Impact Assessment Act* and the objectives of IAAC, but also the needs of First

Nations. While many First Nations are strengthening their ability to participate in and conduct assessments, capacity remains a key concern. Participation in major project assessments places high demands on First Nations often requiring the allocation of significant financial, administrative and leadership resources to meet assessment timelines and procedural requirements. Co-administration of assessments will involve even greater demands on the resources of First Nations. The policy framework for co-administration agreements must be supported by meaningful investments to ensure that First Nations have the capacity to successfully co-administer impact assessments.

To negotiate agreements, First Nations may also have to consider and address areas of territorial overlap, jurisdictional cooperation and the legacy of community experiences with past major project development. They will have to be prepared to make compromises regarding the conduct of assessments to ensure alignment with federal law instead of First Nations laws and practices. As First Nations shift into decision-making roles, they will also need to be prepared for the potential for First Nations decisions to be subject to judicial review and find ways to collaborate with other jurisdictions and lifecycle regulators. First Nations will have to assess whether they would like to assume the burdens and responsibilities of co-administering impact assessments in light of these challenges and benefits. Ultimately, co-administration agreements will provide new opportunities for First Nations to exercise powers and shape impact assessment processes in ways that have not yet been made available to most First Nations in Canada. In order to maximize those opportunities, First Nations will want to invest time and effort in helping to shape the regulatory and policy framework that will guide the development and implementation of these new tools.

While it is always open to First Nations to undertake their own assessment in a manner aligned with their legal orders, customs, etc., these are not always recognised, upheld, implemented, or funded by federal/provincial/territorial counterparts. One potentially attractive aspect of co-administration agreements is that First Nations would be in a better position to ensure they are adequately funded for the activities involved.

QUESTIONS

The following questions are examples of some of the issues that will need to be addressed in the development of a policy and regulatory framework for Co-Administration Agreement Regulations.

1. The *Indigenous Co-Administration Agreement Regulations* will require agreements to identify specified lands over which agreements would apply. How should First Nations approach policy submissions to the Government of Canada relating to the delineation of First Nations territories?
2. Do you have any recommendations for how to address community capacity limitations in the submission from the Assembly of First Nations?
3. What powers, duties or functions should be included in the Co-Administration Agreement Regulations for Indigenous Governing Bodies to exercise?
4. Should s. 9 designation decisions be available to Indigenous Governing Bodies under Co-Administration Agreements?

5. 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?
6. If the Government of Canada were to enter into a substitution agreement with a non-Indigenous jurisdiction (province) what role should IGBs play in the substituted impact assessment process?
7. 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?