

## Something Old, Something New: Canada's Proposed Impact Assessment Act

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### ▼ Overview

#### Environmental Bulletin

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MARCH 22, 2018

As summarized in our first [bulletin](#) in this series, the federal government recently proposed sweeping changes to Canada's environmental legislation, including the environmental assessment process for major projects in Canada. If Bill C-69 is passed, the *Canadian Environmental Assessment Act, 2012* will be replaced with the new *Impact Assessment Act* (IAA).

The proposed changes include:

- the elimination of the long-standing "significant adverse effects" threshold; going forward, the approval of all projects which undergo impact assessment will be based on a determination by the Minister of Environment or, in some circumstances, the federal Cabinet on whether the adverse effects of a project are in the "public interest"
- the expansion of the types of impacts to be considered during an impact assessment
- procedural changes, including the addition of a new "planning phase" at the beginning of the impact assessment process, and changes to statutory timelines
- authorizing the Minister of Environment to effectively prohibit a project at an early stage, prior to the completion of a full assessment
- greater involvement of Indigenous peoples and the public in the impact assessment process
- a much greater emphasis on enforcement, including higher penalties for failure to comply with the requirements of the *Impact Assessment Act* or conditions that are attached to a project approval

This bulletin focuses on the proposed changes that will most affect those who have or are planning to develop projects in Canada.

### ▼ From "Significant Adverse Effects" to "Public Interest"

Under CEAA 2012, the questions that must be answered in order to approve a project are: i) is the project likely to result in significant adverse environmental effects? ii) if so, are the significant adverse effects justified? iii) where significant adverse effects are justified or are unlikely, what conditions should be imposed?

Under the proposed IAA, the "significant adverse effects" threshold is eliminated. No project subject to assessment can be approved unless the Minister of Environment or, in some cases, the federal Cabinet, determines that the adverse effects of the project are in the public interest.

In deciding whether the effects are in "public interest", decision-makers must consider a broader set of factors, including:

- the extent to which the designated project contributes to "sustainability" (which is defined in the Act as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations")
- the extent to which the effects are adverse

the implementation of the mitigation measures that the Minister or the federal Cabinet, as the case may be, considers appropriate

the impact, whether beneficial or adverse, that the designated project may have on any Indigenous group

any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*

the extent to which the effects of the designated project hinder or contribute to the ability of Canada to meet its environmental obligations and its commitments in respect of climate change.

The Minister must issue written reasons in respect of any decision, setting out how these factors were taken into account when making the public interest determination.

## ▼ More Effects to be Considered

Whereas CEAA 2012 focused on physical changes to the environment and the social and economic effects that result from those physical changes, the IAA includes a broader list of changes to be considered in the impact assessment, including:

changes to the environment and to health and social economic conditions, together with the consequences of those changes, cumulative effects and any interaction between the effects

mitigation measures that are technically and economically feasible and that would mitigate any adverse effects

the impact the project may have on any Indigenous group and any adverse impact the project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*

the purpose of the project

alternative means of carrying out the project that are technically and economically feasible, including through the use of best available technologies, and the need for any alternatives

traditional knowledge of the Indigenous peoples of Canada

the extent to which the project contributes to sustainability

the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change

The impact assessment report prepared by the Agency or review panel must discuss all of these effects (to the extent designated as being within the scope of the assessment) and must identify which of these effects will impact federal components of the environment, or are effects which are directly or by necessary implication related to activities that can only occur after receiving a federal permit or authorization.

## ▼ Planning Phase

The addition of the 180-day "planning phase" is expected to be a significant change for project proponents.

In order to commence the planning phase, a proponent must submit an initial project description. This will require proponents to develop an initial project description, with the expectation that it may be revised during the planning phase.

The Impact Assessment Agency (functionally, the current Canadian Environmental Assessment Agency, renamed) will engage with Indigenous groups and stakeholders with respect to the project during the 180 period, giving the public an opportunity to provide comments on the initial project description, and offering to consult with Indigenous groups that may be affected.

Next, the Agency will provide the proponent with a "... summary of the issues with respect to the project that it considers relevant...". Then, it is the proponent's obligation to respond to the summary of issues with a notice that sets out how the proponent intends to address the issues, as well as a detailed description of the project. After the planning phase is complete, the Agency will determine if an impact assessment is warranted.

The government has indicated that the intention behind the introduction of the "planning phase" is to ensure that project proponents have a clear understanding of the issues to be addressed and the scope of the studies and reports required.

## ▼ Greater Likelihood of a Review Panel

Once the Agency has issued its notice of commencement of an impact assessment, there is a 45-day period within which the Minister may refer the assessment to a review panel if that would be in the public interest. When making that determination, the Minister must consider, among other things, the extent to which the effects of the project may be adverse – a lower standard than the equivalent threshold under CEAA 2012.

Further, the Minister is required to refer projects that include activities regulated by the *Nuclear Safety and Control Act* and the new *Canadian Energy Regulator Act* to a review panel. Panels will include two members of the Agency, with one Canadian Energy Regulator Commissioner or one Canadian Nuclear Safety Commission member. Taken together, these changes mean that impact assessments are likely to be referred to review panels more often.

## ▼ Early Prohibition of a Project

Under the IAA, the Minister of Environment will have the authority to effectively prohibit a project on the basis that, i) a federal agency advises that it will not issue a permit required for the project or ii) the Minister determines that “... it is clear that the designated project would cause unacceptable effects within federal jurisdiction or unacceptable direct or indirect effects.”

This power can only be exercised during the initial “planning phase.” At that point in time, the Minister and the federal permitting agencies will have relatively little information upon which to conclude that permits will not be issued or that “unacceptable effects” are “clear.”

## ▼ Statutory Timelines

Canada has emphasized that the legislated timelines for an assessment are shorter under the IAA than under CEAA 2012. For an assessment conducted by the Agency, there is a 300-day timeline under the IAA as opposed to a one-year timeline under CEAA 2012. Similarly, for an assessment conducted by a review panel, there is a 600-day timeline under the IAA compared to a two-year timeline under CEAA 2012.

However, these timelines do not account for the lengthy 180-day planning phase imposed by the IAA. The new timeline is substantially longer than the 45-day screening period under CEAA 2012. There are also numerous opportunities to stop the clock. During the planning phase, the Minister may extend the time limit for the Agency to provide the notice of commencement by any period, to a maximum of 90 days. The Governor in Council may extend this time limit any number of times. The Minister may also suspend the time limit until any activity prescribed by the regulations, which have not yet been released, is completed. The 300-day and 600-day timelines for assessments may also be extended for similar reasons.

## ▼ Increased role for Indigenous Peoples in IA process

As discussed in our recent [bulletin](#) in this series, the IAA proposes several changes in respect of Indigenous participation in the impact assessment process.

Specific measures include:

- early consultation with Indigenous peoples during the planning phase, together with a requirement that a proponent indicate how it plans to address Indigenous concerns raised during the planning phase

- encouraging greater involvement through a participant funding mechanism

- authorizing the Minister to enter into agreements with Indigenous governments on impact assessment-related matters, to delegate all or a portion of the impact assessment process to Indigenous governments, and potentially to substitute an Indigenous government’s impact assessment process in place of an Agency-led process

- mandating that each impact assessment account for impacts on Indigenous groups generally and on Indigenous rights, and to account for traditional knowledge provided to the Minister

- the creation of an Indigenous Advisory Committee to be established by the Agency

## ▼ Expanded Enforcement Powers

The federal government’s enforcement powers will be substantially broadened under the IAA.

The IAA retains all of the existing offences under CEAA 2012, and adds several new ones (including contravening a condition imposed by the Minister). The penalties for committing an offence under the IAA are also considerably higher, with maximum fines that are as much as 20 times higher than the maximum amount provided for in CEAA 2012.

Bill C-69 introduces liability for senior officers (including directors, chief executive officers and chief financial officers) who have directed, authorized, assented to, acquiesced in or participated in the commission of an offence under the IAA. In addition, the IAA introduces comprehensive whistleblower protections for any employees who refuse to act in a manner that they believe violates the IAA or who makes voluntary disclosures to federal regulators.

## ▼ Transitional Provisions

The IAA contains transitional provisions for assessments that have commenced before it comes into effect. Projects for which assessments have begun under CEAA 2012 but which have not progressed too far will shift automatically to the new regime. For example, if, when the IAA comes into force, a proponent has submitted a project description under CEAA 2012, but the CEA Agency has not posted a notice as to whether an assessment is required, the screening will be terminated and the project description will be deemed an initial project description under the IAA.

Similarly, if an environmental assessment under CEAA 2012 is ongoing (whether or not under a review panel) but the proponent has not collected the information or undertaken the studies required by the CEA Agency, it will be continued under the IAA and the Agency will be deemed to give the proponent a notice of commencement on the day that the IAA comes into force. However, any ongoing assessment by the National Energy Board or the Canadian Nuclear Safety Commission commenced under CEAA 2012 will be continued by the already-constituted review panel as if CEAA 2012 had not been repealed.

If an environmental assessment had been referred to a review panel by the Minister or is otherwise ongoing under CEAA 2012 and the proponent has already collected the information and undertaken the studies required by the CEA Agency, then that assessment will be continued under CEAA 2012. The proponent will have a 60-day period after the IAA comes into force to “opt-in” to the new regime by requesting that the Minister terminate the environmental assessment under CEAA 2012 and commence the impact assessment process under the IAA.

When CEAA 2012 came into effect, certain environmental assessments were allowed to continue under the pre-2012 legislation. If such environmental assessments have not progressed by the time CEAA 2012 has come into effect, then the assessments will be terminated automatically.

## ▼ Conclusion

The IAA will broaden project reviews from current environmentally-focused assessments to include additional factors, such as sustainability and social, environmental and health effects of projects. It also provides increased opportunities for public participation and more consultation with Indigenous peoples throughout the process. Despite these procedural changes, the IAA does not represent a radical break from the current federal environmental assessment process. It remains to be seen whether these changes will impose additional burdens on project developers in Canada. Much will depend on how these changes are implemented, both through the formulation of regulations and at the policy level.

Developers with current and planned projects should monitor and engage in the legislative process and the consultation on implementation currently being conducted by the Federal Government. The Federal Government has already released two consultations papers, the first on its approach to revising the Project List regulation and the second in respect of regulations covering information that will be required of proponents and the conditions under which various statutory timelines under the IAA may be extended. In both cases, the deadline for comment is April 15, 2018.

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