

BRIEFING NOTE ON BILL C-69: OVERVIEW OF CANADA'S NEW *IMPACT ASSESSMENT ACT*

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WHAT IS BILL C-69?

On June 21, 2019, Bill C-69 received Royal Assent by Parliament,¹ and was proclaimed into force on August 28, 2019.² This lengthy Bill enacts, amends and repeals a number of federal environmental statutes.

For example, Bill C-69 replaces the existing *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* with the new *Impact Assessment Act (IAA)*.³ The purpose of this briefing note is to provide a concise overview of the information-gathering and decision-making process set out in the *IAA* in relation to major projects that require federal approval under the Act.⁴

IS THE IAA FUNDAMENTALLY DIFFERENT FROM CEAA 2012?

No. In terms of overall structure, the *IAA* is substantially similar to *CEAA 2012*. However, the *IAA* updates and expands certain aspects of *CEAA 2012*, and includes some new features that are not found in *CEAA 2012*, as discussed below.

WHAT ARE THE ESSENTIAL ELEMENTS OF THE IAA?

Among other things, the *IAA*:

- establishes a multi-step process for assessing the environmental, health, social and economic effects of designated projects in order to prevent adverse effects and foster sustainability;
- generally prohibits proponents from carrying out a designated project if it is likely to cause certain environmental, health, social or economic effects, unless the Minister of the Environment or the federal Cabinet approves the project on the basis that such effects are in the public interest;
- establishes a new “early planning” stage for an impact assessment of a designated project, which includes public participation opportunities and requires consultation with other jurisdictions, including Indigenous governing bodies;

¹ S.C. 2019, c.28. The full text of Bill C-69 is available at <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/royal-assent#ID0E4DDI>.

² See <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/si-tr86-eng.html>.

³ See Part 1 of Bill C-69.

⁴ This briefing note conveys general legislative information, and should not be construed or relied upon as a legal opinion or advice. The content of this briefing note is current to August 28, 2019, and will be periodically updated as the *IAA* is implemented by the federal government.

- enables the Minister to refer an impact assessment of a designated project to a review panel if he or she considers it in the public interest to do so; however, if the designated project includes physical activities that are regulated under the *Nuclear Safety and Control Act*, *Canadian Energy Regulator Act*, *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* or *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, then it is mandatory for the Minister to refer an impact assessment to a review panel that includes members of the lifecycle regulators under the foregoing legislation (e.g. Canadian Nuclear Safety Commission, Canadian Energy Regulator (formerly National Energy Board) and offshore boards);
- establishes statutory time limits in relation to the planning stage, the completion of impact assessments and the making of certain decisions under the Act;
- requires meaningful public participation throughout the assessment process, and establishes a participant funding program to enable members of the public to engage in an impact assessment;
- establishes the Canadian Impact Assessment Registry in order to enable “convenient” public access to project files;
- lists approximately two dozen specific factors that must be taken into account when an impact assessment is conducted under the Act, including potential environmental impacts, effects on Indigenous rights, the need for and purpose of the project, and feasible alternatives (see below);
- facilitates cooperation with other jurisdictions, including Indigenous governing bodies, through various means (e.g. delegation of any part of an impact assessment, establishment of a joint review panel, or substitution of another process for the federal impact assessment process) in order to achieve the goal of “one project, one assessment”;
- requires that scientific, technical and other information taken into account in an impact assessment be made available to the public through the Internet-based registry;
- specifies several factors to be considered when the Minister or the federal Cabinet are deciding whether or not to approve a designated project under the Act, and requires their reasons for decision to be publicly available;
- authorizes the imposition of conditions in approvals granted under the Act, which must be complied with by the proponent of a designated project;
- provides for the use of regional assessments to evaluate effects of existing or future activities in a broad geographic area, and the use of strategic assessments to evaluate federal policies, plans and programs or certain issues such as climate change;
- establishes basic requirements for assessing the environmental effects of non-designated projects that are proposed on federal lands (e.g. national parks) or that are to be carried out outside Canada;
- confers regulation-making authority upon the Minister and federal Cabinet under the Act;
- contains standard investigation, enforcement and penalty provisions;
- establishes the new Impact Assessment Agency of Canada as the authority responsible for conducting and coordinating impact assessments of designated projects;
- requires the Minister to establish a multi-stakeholder advisory committee to provide implementation advice on project, regional and strategic assessments;

- requires the Agency to establish an expert committee and an Indigenous advisory committee to address certain issues related to project, regional and strategic assessments; and
- includes transitional provisions to address assessments that were initiated under previous federal legislation (*CEAA 2012* and *CEAA 1992*).

WHAT ARE THE PURPOSES OF THE IAA?

The *IAA* sets out a number of public policy objectives⁵ which are to be achieved during the implementation of the Act, including: fostering sustainability; applying precaution to avoid adverse effects within federal authority; promoting cooperation and coordination with other jurisdictions;⁶ facilitating timely assessments and meaningful public participation; and ensuring respect for treaty and aboriginal rights entrenched by section 35 of the *Constitution Act, 1982*. Unlike *CEAA 2012*, the *IAA*'s purpose statement also commits to establishing “a fair, predictable and efficient process for conducting impact assessments that enhances Canada’s competitiveness, encourages innovation in the carrying out of designated projects and creates opportunities for sustainable economic development.”

WHAT IS A “DESIGNATED PROJECT” UNDER THE IAA?

In general, the requirements of the *IAA* only apply to “designated projects” that have been prescribed by regulation under the Act.⁷ The recently passed “Physical Activities Regulations”⁸ limit the *IAA*'s application to only large-scale projects that were deemed to have the greatest potential to affect specific areas of federal jurisdiction (e.g. fisheries, aquatic species at risk, migratory birds, Indigenous interests, etc.). Projects that are not caught by this regulatory list under the Act may still require permits, approvals or licences under other applicable federal (or provincial) laws.

IS THE DRAFT IAA PROJECT LIST IDENTICAL TO THE CEAA 2012 LIST?

No. While various hydro-electric, military and oil/gas projects will continue to be subject to the *IAA*, some projects that appeared on the *CEAA 2012* Project List regulation have been dropped from the Physical Activities Regulations passed under the *IAA* (e.g. new/expanded apatite mines, decommissioning/abandonment of certain pipelines, facilities that manufacture products from uranium, thorium or plutonium, etc.). Similarly, the size, length, production or capacity thresholds for many project types (e.g. nuclear fission/fusion reactors, various mines, new/expanded pipelines, public highways, railway lines, uranium mills, etc.) have been significantly increased from the *CEAA 2012* list, which means that all projects below the applicable threshold will no longer require an impact assessment under the *IAA*.

The Physical Activities Regulations under the *IAA* also include some new types of projects that were not subject to the *CEAA 2012* regime (e.g. wind power projects), and decreases the project

⁵ *IAA*, section 6.

⁶ *IAA*, section 21.

⁷ *IAA*, sections 2, 7 and 109(b).

⁸ See SOR/2019-285: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html>.

thresholds for other forms of renewable energy (e.g. tidal power facilities). In addition, the Physical Activities Regulations omit other environmentally significant activities that may affect areas of federal jurisdiction (e.g. fracking, cement plants, decommissioning of nuclear facilities, refurbishment/life extension of nuclear power plants, etc.).

CAN THE MINISTER APPLY THE IAA TO A NON-DESIGNATED PROJECT?

Yes. The Minister has the discretionary power to make an order applying the IAA to a specific activity or facility that is not found in the Physical Activities Regulations.⁹ This residual power may be exercised by the Minister on his/her own initiative, or upon request by members of the public, Indigenous communities or other persons. The order is only available if the Minister opines that “either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.”¹⁰

WILL A DESIGNATED PROJECT ALWAYS REQUIRE AN IMPACT ASSESSMENT?

No. After a proponent files its project description at the outset of the planning stage, the Agency must determine whether or not a federal impact assessment will be required.¹¹ In making this determination, the Agency must consider certain factors (e.g. public comments, proponent responses, Indigenous rights, etc.), and must web-post its decision. In effect, this provision (like its predecessor in *CEAA 2012*) enables the Agency to dispense with the need for an impact assessment for designated projects on a case-by-case basis.

In addition, some designated projects will be excluded from impact assessment requirements if they meet regulatory conditions that have been established through a regional assessment under the IAA. Similarly, certain *in situ* oil sands projects are exempt from the IAA process if they are subject to a legislated “hard cap” on greenhouse gas emissions. The duty of federal authorities to assess the environmental effects of projects on federal lands or outside of Canada¹² may also be subject to certain exceptions.¹³

WHAT ARE THE BASIC STAGES OF AN IMPACT ASSESSMENT?

Under the IAA, the impact assessment process for designated projects will consist of the following five stages:

- completion of the planning stage by the Agency;
- preparation and filing of the impact statement by the proponent of the project;
- preparation and filing of the impact assessment report by the Agency or review panel;

⁹ IAA, section 9.

¹⁰ *Ibid.*

¹¹ IAA, section 16.

¹² IAA, sections 81 to 91.

¹³ See <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/consultation-paper-ministerial-order-classes-projects-federal-lands.html>.

- decision by the Minister or federal Cabinet on whether the proposed project should be approved; and
- project implementation in accordance with conditions set out in the decision statement, including mitigation measures and follow-up programs (e.g. monitoring, reporting, etc.).

Each of these stages is described below in more detail.¹⁴

WHAT HAPPENS AT THE PLANNING STAGE?

One of the new and potentially useful features of the *IAA* is the upfront planning stage in which the public, Indigenous peoples and other jurisdictions are invited by the Agency to provide information, identify issues or concerns, and contribute to planning an impact assessment of a designated project.¹⁵

If the proponent wishes to proceed with a designated project, then the planning stage begins when the proponent files an initial project description that contains the basic information prescribed by new regulations under the *IAA*.¹⁶ Among other things, the Agency must web-post the project description, ensure meaningful opportunities for public comment, undertake Indigenous consultation, and prepare a summary of the issues raised during the planning stage. In carrying out these tasks, the Agency can solicit information from federal authorities that may possess specialized or expert knowledge,¹⁷ and will collaborate with any relevant lifecycle regulator with jurisdiction over activities associated with the designated project.

Once the Agency has received all of the necessary information (including the proponent's response to the issues and the proponent's more detailed project description), it must determine whether or not an impact assessment will be required (see above). If the Agency decides that an impact assessment is required, then it will provide a notice of commencement, and will finalize and issue a number of documents required by *IAA* regulations, such as:

- “tailored” guidelines that specify the project-related information to be gathered, and studies to be undertaken, by the proponent in the preparation of its impact statement;
- plan for cooperating with other jurisdictions;
- plan for Indigenous engagement/partnership and public participation; and
- permitting plan that addresses other licencing or approval requirements that apply to the designated project.¹⁸

¹⁴ See also <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/impact-assessment-process-overview.html>. A “Practitioner’s Guide” to the *IAA* has also been recently web-posted: see <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>.

¹⁵ *IAA*, sections 10 to 17.

¹⁶ See SOR/2019-283: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors283-eng.html>.

¹⁷ *IAA*, section 23.

¹⁸ *IAA*, section 18.

All of the foregoing planning steps are to be completed within 180 days of the web-posting of the initial project description, although the *IAA* allows this timeline to be suspended or extended.¹⁹

WHAT MUST THE PROPONENT ADDRESS IN THE IMPACT STATEMENT?

The proponent must prepare, consult upon and file an impact statement containing the required information and studies within three years of the notice of commencement issued by the Agency. However, this timeline may be extended at the request of the proponent.²⁰ If the required documentation is not filed by the applicable deadline, the impact assessment process is terminated.²¹

The “tailored” guidelines issued by the Agency during the planning stage will identify the specific factors to be addressed by the proponent in its impact statement. When specifying these factors, the Agency must “take into account” the various factors that will be considered by the Agency or review panel while conducting the impact assessment (see below).²² However, the scope of these factors (or the extent of their relevance) may be determined or adjusted by the Agency in the impact statement guidelines issued to the proponent.²³ In practice, these provisions will provide the Agency with considerable latitude in establishing the types of information, and the appropriate level of detail, that should be provided in the proponent’s impact statement.

Once the impact statement has been filed, it is reviewed by the Agency (with input from the public, Indigenous peoples, federal authorities and other persons) to ensure that it contains all of the necessary information specified by the “tailored” guidelines. If the Agency determines that information is missing, the proponent will be requested to supply it in due course. Conversely, if the Agency determines that the proponent’s impact statement is complete, then a notice is posted on the *IAA* Registry²⁴ and the designated project moves to the impact assessment stage, as described below.

WHAT HAPPENS AT THE IMPACT ASSESSMENT STAGE?

Depending on the type of designated project being proposed, the impact assessment will be carried out by either the Agency or a review panel appointed under the *IAA* (see below). In either case, the impact assessment must consider a number of different factors:²⁵

- the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including:
 - (i) the effects of malfunctions or accidents that may occur in connection with the designated project;

¹⁹ *Ibid.*

²⁰ *IAA*, section 19.

²¹ *IAA*, section 20.

²² *IAA*, section 18(1.1).

²³ *IAA*, section 18 (1.2).

²⁴ *IAA*, section 19(4).

²⁵ *IAA*, section 22.

- (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out; and
- (iii) the result of any interaction between those effects;
- mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
- the impact that the designated project may have on any Indigenous group and 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 purpose of and need for the designated project;
- alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
- any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;
- Indigenous knowledge provided with respect to the designated project;
- the extent to which the designated project contributes to sustainability;
- 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;
- any change to the designated project that may be caused by the environment;
- the requirements of the follow-up program in respect of the designated project;
- considerations related to Indigenous cultures raised with respect to the designated project;
- community knowledge provided with respect to the designated project;
- comments received from the public;
- comments from a jurisdiction that are received in the course of consultations;
- any relevant regional or strategic assessment;
- any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;
- any study or plan that is conducted or prepared by a jurisdiction or an Indigenous governing body in respect of a region related to the designated project and that has been provided with respect to the project;
- the intersection of sex and gender with other identity factors; and
- any other matter relevant to the impact assessment that the Agency requires to be taken into account.

When conducting an impact assessment, the Agency or review panel must ensure meaningful public participation,²⁶ and participant funding will be made available to facilitate public engagement.²⁷

²⁶ IAA, sections 27 and 51.

²⁷ IAA, section 75.

Upon completion of the impact assessment process, the Agency or review panel must file a report²⁸ with the Minister for decision-making purposes (see below). These reports will be web-posted,²⁹ and the reports must:

- set out the effects that are likely to be caused by the carrying out of the designated project;
- identify adverse effects (both direct and incidental effects) within federal jurisdiction, and specify the extent to which such effects are significant;
- describe how Indigenous knowledge was taken into account and used to determine the project's effects;
- summarize public comments received during the impact assessment stage; and
- provide recommendations regarding mitigation measures and follow-up programs.

Once the impact assessment stage has been formally commenced, the Agency's report must be filed within 300 days,³⁰ while a review panel's report must be filed within 600 days.³¹ However, these timelines may be adjusted, suspended or extended under the *IAA*.

HOW DOES A DESIGNATED PROJECT GET REFERRED TO A REVIEW PANEL?

For designated projects that will be assessed by the Agency, the Minister may, within 45 days of the web-posting of the notice of commencement, refer the impact assessment to a review panel, if it is in the public interest to do so.³² If the impact assessment is referred to a review panel in the Minister's discretion, the Agency posts a notice of the Minister's decision (and the reasons for decision) on the Registry. For certain projects, it is open to the Minister to establish a joint review panel with another jurisdiction that also requires an assessment of the project's environmental effects.³³

The members of review panels are appointed by the Agency, and they must be "unbiased and free from any conflict of interest" and possess "knowledge or experience" in relation to the project's anticipated effects or in relation to Indigenous interests and concerns that are relevant to the assessment.³⁴ For such assessments, the Minister establishes the terms of reference, which specify the review panel's authority, mandate, issues to be considered, time limits, and procedural requirements.³⁵

However, if the designated project includes physical activities that are regulated under certain federal laws (e.g. *Nuclear Safety and Control Act*, *Canadian Energy Regulator Act*, etc.), then the Minister must automatically refer the impact assessment to an "integrated" review panel that includes members of the relevant lifecycle regulator.³⁶ The members of integrated review panels

²⁸ *IAA*, sections 28(3), 28(3.1), 28 (3.2), and 51(1)(d).

²⁹ *IAA*, section 28(4) and 55.

³⁰ *IAA*, section 28(2).

³¹ *IAA*, section 37(2). See also section 37.1.

³² *IAA*, section 36.

³³ *IAA*, section 39.

³⁴ *IAA*, section 41.

³⁵ *Ibid.*

³⁶ *IAA*, section 43.

are appointed by the Agency from rosters developed by the Minister,³⁷ but members from lifecycle regulators cannot constitute the majority of the panel members.³⁸ Nevertheless, as a result of a last-minute amendment to the *IAA*, it is open to the Agency to appoint a member from a lifecycle regulator as the chairperson of the review panel.

The terms of reference for integrated review panels are jointly established by the Minister and the relevant lifecycle regulator.³⁹ Members of such panels may also exercise powers (and must fulfill licencing duties) conferred upon the lifecycle regulator under its enabling legislation.⁴⁰

Hearings held by review panels must be public,⁴¹ and panels are empowered to summon witnesses or require the production of records.⁴² The panel's hearing procedures must "emphasize flexibility and informality in the conduct of hearings," but must also be consistent with the rules of procedural fairness and natural justice.⁴³

WHAT HAPPENS AT THE FINAL DECISION-MAKING STAGE?

Once the impact assessment report has been filed by the Agency, review panel or integrated review panel, the Minister or the federal Cabinet must determine whether the project's adverse effects within federal jurisdiction are in the public interest.⁴⁴ This determination must be based upon the report as well as the consideration of the following five factors:⁴⁵

- the extent to which the designated project contributes to sustainability;
- the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;
- the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- the impact that the designated project may have on any Indigenous group and 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*; and
- 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.

³⁷ *IAA*, section 50.

³⁸ *IAA*, section 44(4).

³⁹ *IAA*, sections 44 and 47.

⁴⁰ *IAA*, sections 46, 48, 51(2) and 51(3).

⁴¹ *IAA*, sections 51(1)(c) and 53(3).

⁴² *IAA*, section 53(1).

⁴³ *IAA*, section 54.

⁴⁴ *IAA*, sections 60 to 62. The Minister's determination must be made within 30 days, while the Cabinet's determination must be made within 90 days: see *IAA*, sections 65(3) and 65(4).

⁴⁵ *IAA*, section 63.

If the project's effects are found to be in the public interest, then the Minister or Cabinet must establish appropriate conditions with which the proponent shall comply.⁴⁶ These conditions will address the implementation of necessary mitigation measures and follow-up programs (including adaptive management plans).⁴⁷

The Minister is required by the *IAA* to issue a "decision statement," together with detailed reasons, to advise the proponent whether the Minister or Cabinet determined that the project's effects are in the public interest and, if so, what conditions are being imposed upon the proponent. Decision statements must be web-posted by the Agency,⁴⁸ and for designated projects assessed by an integrated review panel, the Minister's decision statement may designate conditions that are considered to be part of any licencing approval issued by the relevant lifecycle regulator.⁴⁹

WHAT HAPPENS IN THE POST-DECISION STAGE?

If the project has been permitted to proceed under the *IAA*, the proponent is responsible for ensuring compliance with all conditions imposed under the Act. It is anticipated that the Agency will conduct compliance monitoring and utilize enforcement measures to ensure that such conditions are being properly implemented by the proponent. Similarly, lifecycle regulators will verify compliance with the terms or conditions of any statutory approvals issued under their enabling statutes in relation to the project.⁵⁰

In the post-decision stage, the Minister is generally empowered to subsequently amend, add or delete conditions set out in the decision statement (or modify the project description), but cannot otherwise change the decision itself.⁵¹ These proposed changes must be subject to public consultation before they are finalized by the Minister.⁵²

In addition, the Minister is obliged to establish the period in which the proponent must substantially begin the designated project.⁵³ If the project is not substantially commenced by the specified timeline, then the decision statement expires.⁵⁴

HOW DO THE *IAA* TRANSITIONAL PROVISIONS WORK?

The *IAA* contains transitional provisions that dictate what happens to assessments which were started but not yet completed under *CEAA 2012* and *CEAA 1992*. For example, all outstanding screenings and comprehensive studies under *CEAA 1992* were terminated when the *IAA* came into

⁴⁶ *IAA*, sections 64 and 144(1)(b). The Agency is obliged to provide recommendations to the Minister on appropriate conditions: see *IAA*, section 55.1.

⁴⁷ *IAA*, section 64(4).

⁴⁸ *IAA*, section 66.

⁴⁹ *IAA*, section 67.

⁵⁰ For example, see *IAA*, section 67(3.1).

⁵¹ *IAA*, section 68. However, for designated nuclear projects, the Minister cannot alter a condition that has been designated to be part of a licence issued under the *Nuclear Safety and Control Act*: see *IAA*, section 68(4).

⁵² *IAA*, section 69.

⁵³ *IAA*, section 70.

⁵⁴ *IAA*, section 70(3).

force.⁵⁵ Similarly, *CEAA 2012* assessments of project types that are no longer listed under the *IAA* may be terminated. However, designated projects that are the subject of an ongoing assessment under *CEAA 2012* will continue under *CEAA 2012*, but proponents may “opt-in” to the *IAA* regime.⁵⁶

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⁵⁵ *IAA*, sections 178 and 179.

⁵⁶ *IAA*, section 181.