Questions and Answers about Canada's Proposed New *Impact Assessment Act*

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Questions

Introduction to the New *Impact Assessment Act*

1. What is the new Impact Assessment Act (IAA)?

On February 8, 2018, the federal government tabled Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*.[1]

Among other things, Bill C-69 will replace the *Canadian Environmental Assessment Act, 2012* (CEAA 2012)[2] with the new *Impact Assessment Act* (IAA).

2. Why is the Canadian Environmental Assessment Act, 2012 being replaced?

The new IAA has been tabled to satisfy the Minister of Environment and Climate Change Catherine McKenna's mandate to "review Canada's environmental assessment processes to regain public trust and help get resources to market and introduce new, fair processes."[3] The Prime Minister issued Minister McKenna the mandate following an electoral campaign promise to "make environmental assessments credible again."[4] In 2012, the federal government replaced the original *Canadian Environmental Assessment Act* with CEAA 2012, which applies to fewer than 10% of federally regulated projects, restricts what is considered and imposes timelines to ram decisions through, and shuts out members of the public who want to participate.[5]

3. What is the overall takeaway from the IAA?

At first blush, C-69 appears to make sweeping changes to the practice of environmental assessment (EA) in Canada. Perhaps foremost, it shifts away from traditional *environmental* assessment towards an impact assessment (IA)[6] model that focuses on broader sustainability goals. The law states that a purpose of impact assessment is to foster sustainability and requires

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[1] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st sess, 42nd Parl, 2018.

[2] SC 2012, c 19, s 52.

[3] Canada, Office of the Prime Minister, "Minister of Environment and Climate Change Mandate Letter," by Rt. Hon. Justin Trudeau, PC, MP, Prime Minister of Canada (Ottawa: November 2015), online: Government of Canada <http://pm.gc.ca/eng/ministerenvironment-and-climate-change-mandate-letter>.

[4] Liberal Party of Canada, "Real Change: A New Plan for a Strong Middle Class" (2015) at 41: https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf.

[5] Anna Johnston, "Canada's Track Record on Environmental Laws 2011-2015" (CQDE & WCEL, 2015), 6-7: https://www.wcel.org/sites/default/files/publications/WCEL_EnviroLaw_report_med1pg_fnl.pdf.

[6] Bill C-69 uses "impact assessment" rather than "environmental assessment" throughout when referring to assessments under the proposed *Impact Assessment Act*. Both impact assessment and environmental assessment (and their acronyms IA and EA respectively) are used in this brief; generally, attempts are made to use IA to refer to assessments under the proposed *Impact Assessment Act*.

the identification and assessment of a broader suite of positive and negative impacts, including environmental, social, economic, health and gender impacts.

Bill C-69 also introduces an "assessment planning phase" to facilitate multijurisdictional collaboration and early public engagement, and does away with the public participation "standing test" imposed by lifecycle regulators such as the National Energy Board. It sets out factors for the Minister of Environment or Climate Change (the Minister) (or Cabinet, as the case may be) to consider when making decisions, and requires decision-makers to provide detailed reasons for decision.

But in many ways, C-69 is a retrenchment of the status quo. Many of the improvements are discretionary, meaning that whether assessments will be any better under the IAA is largely up to the government bodies administering the Act. It maintains CEAA 2012's "project list" approach, in which only projects listed in regulations or designated on a case-by-case basis by the Minister are eligible for assessment. What is more, even "designated" projects to not *require* an assessment; rather, the Impact Assessment Agency will decide whether an assessment is necessary.

While it removes the public participation standing test and says that meaningful public participation is a purpose of the Act, much of when and how participation opportunities will be offered is left to policy.

Similarly, while it aims to promote collaboration with Indigenous jurisdictions, it does not mention the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[7] or require the government to obtain the consent of Indigenous authorities on process or final decisions. It introduces a new emphasis on regional and strategic assessment, but falls short of describing circumstances where they will actually be required or how their outcomes are to be applied. And while the Act replaces the "significance and justification" test set out in CEAA 2012, it fails to ensure that decisions make the greatest possible contribution to sustainability or are even explicitly justified. Instead, it sets out a "public interest" test without a legislated right of appeal.

Thus, while Bill C-69 purports to make significant changes to federal EA in order to achieve the government's mandate, it falls far short of the mark of a truly "next generation" IA regime.

Sustainability

4. What does the new IAA say about sustainability?

As the new title suggests, the IAA moves from only reviewing a project's biophysical environmental effects within federal jurisdiction, to considering a broad range of positive and negative environmental, social, economic, health and gendered impacts. Assessments must take into account cumulative effects, alternative means of carrying out projects, alternatives to them,

[7] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UNDRIP*], online: United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement> [UNDRIP].

the extent to which a project contributes to sustainability, and climate change commitments.[8] Fostering sustainability is a purpose of the Act, and the Minister or Cabinet (as the case may be) must consider (among other things) a project's contribution to sustainability when deciding whether to approve a project.[9]

5. Will the IAA ensure sustainability?

Not necessarily. While purporting to encourage ecological, social and economic sustainability, Bill C-69 allows for unsustainable decisions. The core project approval test is whether the project is in the public interest,[10] rather than whether it will contribute to net sustainability. Also, while the Minister or Cabinet must consider contributions to sustainability when determining whether a project is in the public interest,[11] there is no barrier to weighing other factors like short-term economic or political benefits more heavily, and no prohibition against making decisions that would result in the crossing of an ecological limit or otherwise undermine sustainability.[12]

Also, while alternatives to the project must be considered during the assessment, decision-makers are not required to select the best option from among those alternatives for achieving the greatest amount of net benefits while minimizing negative effects. Similarly, while decision-makers must provide reasons for decision,[13] they are not required to justify any adverse effects they approve, or show how a project is in the public interest. Without these safeguards, decision-makers will be able to continue the current practice of allowing significant environment harms, and keeping the public in the dark about how decisions are reached.

Climate

6. Is there a climate trigger?

No, the IAA does not establish any kind of trigger for when a project requires an IA due to climate considerations. A consultation paper developed by the Government of Canada on revising the project list states that the "[p]otential for direct greenhouse gas emissions above a defined level" could be used to determine whether a project is on the list, but that projects like in-situ oil sands facilities could be exempted where a jurisdiction (such as a province) has a greenhouse gas emissions cap in place.[14]

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[8] Bill C-69*, supra* note 1 at cl 1, s 22(1).

[9] *Ibid*, cl 1, s 63(a).

[10] *Ibid*, cl 1, ss 60(1), 62.

[11] Other factors that decision-makers must consider are the magnitude of adverse effects, the implementation of mitigation measures, impacts on Indigenous peoples and their rights, and implications on Canada's environmental and climate change commitments: *ibid*, cl 1, s 63(b)-(e).

[12] Bill C-69*, supra* note 1 at cl 1, s 63(a).

[13] *Ibid*, cl 1, s 65(1).

[14] Government of Canada, "Consultation Paper on Approach to Revising the Project List" (2018) at 4, 7: https://s3.ca-central-1.amazonaws.com/ehq-production-canada/documents/attachments/9af3ad917d78fae44f4098f7cc79c50c43f2f06f/000/008/960/original/Consultation_Paper_on_Approach_to_Revising_the_Project_List.pdf?1520610193.

7. Does the IAA contain a climate test?

Partially. Climate effects are one of a long list of factors that must be "considered" in an assessment of a designated project. There is no legislated trigger for an assessment of projects on the basis of climate, but for designated projects, assessments must consider "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."[15] Also, when making a decision on whether a project is in the public interest, the Minister or Cabinet (as the case may be) must also consider the text to which the project will hinder or help Canada's ability to meet its climate change obligations and commitments.[16]

Roles and Responsibilities

8. What is the role of the Canadian Environmental Assessment Agency?

Bill C-69 renames the Canadian Environmental Assessment Agency the Impact Assessment Agency of Canada (the Agency).[17] Its duties include:[18]

a. To conduct or administer IAs (including regional IAs where directed by the Minister), and provide secretariat support to panel reviews
b. To coordinate consultations with Indigenous peoples during assessments
c. To promote cooperation with other jurisdictions
d. To promote or conduct IA research
e. To promote the quality and consistency of IA with the purposes of the IA Act
f. To ensure compliance with the IA Act, and
g. To develop IA policies and consult with Indigenous peoples on the development on that policy

These duties largely mirror those of the Agency under *CEAA 2012*, with the exception of two new objects: coordinating consultations with Indigenous peoples, and development of policy.

As with under *CEAA 2012*, the Agency is responsible for establishing project files, maintaining a registry of all information associated with impact assessments, including an internet site.[19]Also, the Minister may delegate any of his or her powers, duties or functions under the Act to an officer or employee of the Agency.[20]

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[15] *Ibid*, cl 1, s 22(1)(i).
[16] *Ibid*, cl 1, s 63(e).
[17] *Ibid*, cl 1, s 153(1).
[18] *Ibid*, cl 1, s 155.
[19] *Ibid*, cl 1, ss 104(3), 105-06.
[20] *Ibid*, cl 1, s 54(1).

9. What is the role of the NEB, CNSC and other regulators?

The proposed IA Act reduces the role of the CER and CNSC in assessments. Projects regulated by the CER or CNSC that require an assessment will be conducted by panels that are appointed by the Minister of Environment and Climate Change.[21] The Agency will act as the secretariat to the panels, which must contain at least three members. At least one panel member must be recommended by the CER or CNSC, and may be members of those regulators.[22] There is no limit to how many panel members may be comprised of regulators, and the chair may be a regulator.

IAs of projects regulated by the CER and CNSC are intended to also serve as regulatory review processes; in other words, while the CER and CNSC will have to issue separate regulatory approvals for those projects, they will not need to hold additional reviews or hearings – or engage the public – outside of the assessment prior to issuing those licenses.[23]

When the Act first comes into force, projects regulated by the Nova Scotia and Newfoundland-Labrador offshore petroleum boards will fall under the authority of the Agency. However, at any time after the IA Act comes into force, Cabinet may amend it to require assessments of projects regulated by the offshore boards to be conducted by review panels appointed by the Minister. Such panels must be comprised of at least five members, at least two of which must be appointed on the recommendation of the offshore petroleum boards or members of those boards.[24]

10. Who will decide whether to approve projects, and how?

For assessments conducted by the Agency, the Minister will be the decision-maker, although she would be able to refer decisions to Cabinet.[25] For assessments by review panel, decisions will be made by Cabinet.[26]

As noted above, both Ministerial and Cabinet decisions must be based on whether the project is in the "public interest," having consideration of:[27]

a. The project's contribution to sustainability,
b. Magnitude of adverse effects,
c. Implementation of any mitigation measures required as a condition of approval,
d. Impacts on Indigenous groups and Indigenous rights, and
e. The extent to which the project will help or hinder Canada's environmental and climate commitments.

For all decisions, the Minister must issue public, detailed reasons for decision that demonstrate how the decision-maker considered the above-listed factors.[28] However, the Act will not require

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[21] *Ibid*, cl 1, s 43.

[22] *Ibid*, cl 2, ss 43-50.

[23] Personal conversation with the Bill C-69 drafting team; *ibid*, cl 1, ss 45-46, 48.

[24] Bill C-69, *ibid*, cl 2-8, 196(2).

[25] *Ibid*, cl 1, s 60(1).

[26] *Ibid*, cl 1, s 61.

[27] *Ibid*, cl 1, s 63.

[28] *Ibid*, cl 1, s 65(2).

the Minister or Cabinet to justify how they reached the public interest determination, or justify the trade-offs that are inevitable with resource development proposals. There are also no requirements for decisions to be consistent with UNDRIP (only to "consider" impacts on Indigenous rights recognized in Canadian law) or Canada's international climate change commitments (only to consider them), to respect ecological thresholds, or otherwise ensure sustainability and lasting well-being.

The new IA Act does not include a right of appeal or dispute resolution methods (it is worth noting that the new *Canadian Energy Regulator Act* also established under C-69 does contain provisions respecting dispute resolution).[29]

The new Act would allow the Minister to add, remove, or amend conditions of approval following the issuance of a decision statement.[30] This power would allow, for example, the Minister to amend a condition if a new technology becomes available, or to facilitate adaptive management if monitoring reveals effects that were not predicted. It would not allow the Minister to revoke an approval.[31]

11. Does the IAA establish any new bodies?

Bill C-69 requires or enables the appointment of three committees that should provide helpful guidance to and oversight in IA. Specifically, it:

1. Requires the Agency to establish an expert committee to advise it on issues related to IAs;[32]
2. Requires the Agency to establish an advisory committee to advise it on the "interests and concerns" of Indigenous peoples in relation to assessments to be conducted under the Act;[33] and
3. Requires the Minister to establish a Minister's Advisory Council to advise him or her on issues related to the implementation of the IA Act, and regional and strategic assessments.[34]

While these committees are welcome, advice regarding regional and strategic assessments would be better coming from the expert (and Indigenous) advisory committees than the Minster's Advisory Council. The Council will likely be similar in constitution to the current Multi-Interest Advisory Committee, an interest-based committee intended to represent the perspectives of environmental, industry and Indigenous organizations, whereas the expert committee is intended to represent expert rather than interest-based perspectives.

In order for regional and strategic assessments to occur when needed, be conducted under strong terms of reference by panel members best able to represent environmental needs and uphold Indigenous law, be based on the best available science and Indigenous and community

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[29] *Ibid*, cl 10, s 73.

[30] *Ibid*, cl 1, s 68.

[31] *Ibid*, cl 1, s 68(2).

[32] *Ibid*, cl 1, s 157.

[33] *Ibid*, cl 1, s 158.

[34] *Ibid*, cl 1, s 117.

knowledge, and establish much-needed ecological limits, regional and strategic assessments should be guided by expert advice from both Indigenous and non-Indigenous experts.

It is not clear how Indigenous knowledge and issues will be considered in the expert committee.

What Gets Assessed

12. What will be assessed?

At this stage, it is hard to say. Bill C-69 largely maintains the CEAA 2012 approach to what receives an assessment. As with CEAA 2012, regulations will list "designated projects."[35] These regulations are currently being developed, and we do not know what kinds of projects, or how many, will be listed.

Designated projects must undergo an initial screening in a legislated "planning phase" (described below), following which the Agency would decide whether an IA is required.[36] Factors the Agency must consider when determining whether an IA is required include the potential for adverse effects, impacts on Indigenous rights, public comments, and any relevant regional or strategic assessments that have been conducted, or studies or plans for the region.[37]

Projects not on the project list may also be designated by the Minister, if he or she determines that potential adverse effects or public concerns warrant an assessment.[38] Anyone may request that a project be designated, and the Minister must respond, with reasons within 90 days. Projects designated by the Minister are subject to a determination by the Agency that an assessment is required.

The IA Act also requires lesser environmental assessments of projects on federal lands and projects that occur outside of Canada that are either proposed or funded by the Canadian government, that do not appear on the project list. These lesser assessments have little opportunity for public involvement and no requirements for Indigenous collaboration, although they must consider Indigenous and community knowledge, public comments, impacts on Indigenous rights, and mitigation measures.[39] The test for approval is whether the project would likely result in significant adverse environmental effects,[40] Where significant adverse effects are likely, Cabinet will determine whether they are justified in the circumstances.[41]

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[35] *Ibid*, cl 1, s 2.

[36] *Ibid*, cl 1, s 16 (1).

[37] *Ibid*, cl 1, s 16(2).

[38] *Ibid,* cl 1, s 9(1).

[39] *Ibid,* cl 1, s 84.

[40] *Ibid*, cl 1, s 83.

[41] *Ibid*, cl 1, s 83(b).

How will assessments be conducted?

14. What is the assessment planning phase?

The IAA establishes a new assessment planning phase that would occur before the IA. The planning phase would be conducted by the Agency and commence when the proponent submits an "initial description of the project", which the Agency must post on its internet registry.[42]

The IA Act requires the Agency to engage the public, and to offer to consult with other jurisdictions (including Indigenous jurisdictions) and Indigenous groups who may be affected, during this phase.[43] Following this engagement, the Agency is required to provide the proponent with a summary of the issues with respect the project that it considers relevant, including issues raised by the public, a jurisdiction or an Indigenous group.[44] The proponent must then notify the Agency of how it intends to address these issues and provide a detailed project description.[45]

Bill C-69 does not contain many details for the planning phase, and does not require the Agency to develop and publish any plans for the assessment. Most planning phase outcomes, such as plans for how the assessment should be conducted, how to collaborate with jurisdictions, or how to engage the public, will be established in policy or regulations.

15. Who gathers the information?

The proponent. Following the conclusion of the planning phase, the proponent will have three years to gather the information conduct the studies that the Agency sets out in the notice of commencement.[46] The Agency may extend this time limit by any period it considers necessary to conduct the impact assessment.[47] Once the Agency is satisfied that the proponent has provided it with all the necessary studies and information, the assessment may commence. The Agency may also decide to terminate an assessment if the proponent has not provided it with the necessary information.[48]

Any person or jurisdiction may also provide information to guide the assessment, and every federal authority with specialist or expert information must make that information available to the reviewing body on request.[49]

16. How will assessments by the Agency occur?

The Agency will be the responsible authority for most IAs. It must consider all information that is available to it in an assessment, and may require the collection of information.[50] It must also

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[42] Bill C-69, *supra* note 1 at cl 1, s 10.

[43] *Ibid,* cl 1, ss 11-12.

[44] *Ibid,* cl 1, s 14(1).

[45] *Ibid,* cl 1, s 15(1).

[46] *Ibid,* cl 1, s 19(1).

[47] *Ibid,* cl 1, s 19(2).

[48] *Ibid,* cl 1, s 20(1).

[49] *Ibid,* cl 1, s 23.

[50] *Ibid*, cl 1, s 26.

ensure that the public is provided with an opportunity to participate in the assessment.[51] Following the assessment, the Agency will make a draft report available for public comment and then submit a final report to the Minister that describes the effects that are likely to be caused by the project.[52]

17. Can there be assessments by review panel?

Yes. Within 45 days of the commencement of an assessment, the Minister may refer a project to a review panel for it if she determines that a review panel would be in the public interest,[53] and she must refer the assessment to a review panel if the project is regulated by the Canadian Energy Regulator or Canadian Nuclear Safety Commission.[54] Her determination must include a consideration of the extent to which effects of the project may be adverse, public concerns, and opportunities to cooperate with other jurisdictions.[55]

If a project is referred to a review panel, the Minister must appoint review panel members and establish the panel's terms of reference. Members must be unbiased, free from conflicts of interest regarding the projects under review, and have relevant knowledge or experience.[56] Review panel responsibilities will include conducting assessments, making all information publicly available, holding public hearings, and preparing and submitting reports to the Minister.[57]

18. What factors must an assessment consider?

The IAA establishes a number of factors that an impact assessment must take into account, including:[58]

a. Direct, cumulative and interactive effects
b. The effects of malfunctions or accidents
c. Mitigation measures that are economically and technically feasible
d. Impacts on Indigenous peoples
e. The purpose and need for the project
f. Alternative means of carrying out the project, and alternatives to the project
g. Indigenous and community knowledge
h. The extent to which the project contributes to sustainability
i. The extent to which the project hinders or contributes to Canada's climate change and environmental obligations
j. Changes to the project caused by the environment
k. The requirements of follow-up programs
l. Effects on Indigenous cultures

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[51] *Ibid*, cl 1, s 27.

[52] *Ibid*, cl 1, s 28.

[53] *Ibid*, cl 1, s 36(1).

[54] *Ibid*, cl 1, s 43.

[55] *Ibid*, cl 1, s 36(2).

[56] *Ibid*, cl 1, s41(1).

[57] *Ibid*, cl 1, s 51.

[58] *Ibid*, cl 1, s 22(1).

m. Public comments, and comments from other jurisdictions
n. Any relevant regional or strategic assessments that have been conducted
o. The intersection of sex and gender effects with other identity factors
p. Any assessments by Indigenous jurisdictions

19. Does the IAA establish time limits?

Yes. Assessment planning phases must be conducted within 180 days, which the Minister may extend by up to 90 days.[59] Once assessments commence, assessments by the Agency must be completed within 300 days and assessments by review panel must be completed within 600 days,[60] although the Minister or Cabinet may extend these time limits.[61]

Public Participation

20. Does the IAA restrict who gets to participate in assessments?

No, there is no standing test or other restriction on who may participate in an assessment.

21. Will there be meaningful public participation?

Meaningful participation is a goal of the Act,[62] but whether this goal is achieved is largely left to policy and its implementation. The Act does not define "meaningful," or contain guiding principles respecting what constitutes meaningful participation.

The public must be provided with an opportunity to participate in the planning phase.[63] For Agency assessments, the public may participate in the assessment and comment on draft reports.[64] Review panels must hold public hearings, but the public is not guaranteed a right to comment on draft reports.[65] The Act does not require that the public be consulted on how they would like to participate, or require more than one opportunity to participate in assessments.

Also, while the IAA requires the Agency to establish a participant funding program for assessments and follow-up programs, it does not require the Agency to provide enough money to allow the public to participate meaningfully, and the funding program does not apply to substituted assessments, even if, for example, a substituted provincial process has no provision for participant funding.[66]

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[59] *Ibid*, cl 1, ss 18(1), (3).
[60] *Ibid*, cl 1, ss 28(2), 37(1).
[61] *Ibid*, cl 1, ss 28(5)-(7), 37(3)-(4).
[62] *Ibid*, cl 1, s 6(1)(h).
[63] *Ibid*, cl 1, s 11.
[64] *Ibid*, cl 1, ss 27, 28(1).
[65] *Ibid*, cl 1, s 51(1)(c).
[66] *Ibid*, cl 1, s 75(1)-(2).

For non-designated projects on federal lands or outside Canada that have a federal proponent or federal funding, the public is only afforded a 15-day public comment period on the determination, and only where the authority deems it "appropriate in the circumstances."[67]

Availability and Use of Information

22. Will all relevant information be available to the public?

Mostly, although the public may be required to request information rather than have it be available online. The IAA requires the Agency to establish a project file for every designated project that contains all information that it receives in relation to an assessment.[68] Those project files and an internet site will comprise the Canadian Impact Assessment Registry.

Not all information may appear on the internet site. In many cases, the Agency is only required to post a summary of the information, along with details about how to obtain a copy of the full information. This limitation on what information is automatically provided may be due to language laws that require the federal government to post all information in both official languages.

Also, the Act does not require that decision statements indicate the information on which decisions are made, or that this information be made publically available. Nor does the Act require the Registry to contain all information provided to the Agency, or for the Agency to provide information without charge on request.

23. Will the Registry contain information about all projects?

No. The Registry must contain information only about designated projects, or projects that otherwise receive an assessment under the Act. Therefore, it appears that only a small percentage of projects that are federally-regulated, receive federal funding, or have federal proponents will appear on the Registry.

24. How long will information about projects be available?

The Agency is only required to retain project information on the internet site until a project's follow-up program is complete.[69]

25. Will decisions be based on science and Indigenous knowledge?

A purpose of the IAA is to ensure that assessments take into account scientific information and Indigenous knowledge,[70] and the Act implements some important measures to help ensure that science and Indigenous and community knowledge are taken into account (although not that decisions are based on science and Indigenous and community knowledge).

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[67] *Ibid*, cl 1, s 86(1).

[68] *Ibid*, cl 1, s 106.

[69] *Ibid*, cl 1, s 106(1).

[70] *Ibid*, cl 1, s 6(1)(j).

For example, Indigenous and community knowledge must be considered in assessments, and federal authorities in possession of specialist or expert knowledge must make that information available to assessment authorities, including for substituted assessments.[71]

The Act also requires the Agency to establish an expert panel to advise it on scientific, as well as other, issues.[72] However, the Act lacks assurances that assessments and decisions will be based on the best available scientific information, or on Indigenous knowledge. For example, the use of the best available scientific information and data is mentioned in the Preamble, but not required by the Act.[73] There are no provisions respecting peer review, retaining experts independent of government or the proponent, or ensuring sufficient funding for participants to do so.

It should also be noted that the IAA discusses "integrating" science and Indigenous knowledge, which has been criticized as risking subjugation of Indigenous knowledge into the western scientific worldview and treating Indigenous knowledge systems unequally. In order to ensure equal respect for Indigenous knowledge, the Act should recognize Indigenous knowledge as an equally authoritative body of knowledge.

Collaboration with other Jurisdictions

26. Does the IAA encourage collaboration with provinces?

Somewhat, and in some circumstances. The Act's preamble recognizes the importance of cooperating with other jurisdictions in assessments, and a purpose of the Act is to promote cooperation with provincial and Indigenous jurisdictions.[74] During an assessment planning phase and again during the assessment, the Agency is required to offer to consult with any jurisdiction that has powers, duties or functions respecting the project.[75]

For most review panels, the Minister may enter into an agreement to jointly establish the panel with other jurisdictions; however, she is expressly prohibited from jointly establishing review panels of projects regulated by the CER, CNSC or offshore petroleum boards.[76] On the other hand, where a proposal is referred to the Minister under the *Mackenzie Valley Resource Management Act*,[77] the Minister must jointly appoint a review panel to conduct the assessment with the Mackenzie Valley Environmental Impact Review Board.[78]

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[71] *Ibid*, cl 1, ss 22(1)(g),(m), 23, 32(1)(b), 84(b)(c).

[72] *Ibid*, cl 1, s 157(1).

[73] *Ibid*, cl 1, Preamble.

[74] *Ibid*, cl 1, Preamble, s 6(1)(e).

[75] *Ibid*, cl 1, ss 12, 21.

[76] *Ibid*, cl 1, s 39.

[77] SC 1998, c 25.

[78] Bill C-69*, supra* note 1 at cl 1, s 40(2).

The Minister may also enter into agreements to collaborate on regional assessments.[79] However, there is no provision in the Act expressly authorizing the Minister to collaborate with jurisdictions on monitoring or follow-up.

27. Does the IAA facilitate collaboration with Indigenous peoples, and respect Indigenous authority?

Generally, the Act encourages the collaboration with Indigenous jurisdictions in the same ways that it encourages collaboration with provincial jurisdictions, and expressly states that cooperation with Indigenous peoples is a purpose of the Act.[80]

However, it is important to note that the IAA restricts the definition of Indigenous jurisdictions to those established or recognized under Canadian law. Indigenous "jurisdictions" for the purposes of the IAA are:[81]

- nations with IA powers, duties or functions under other federal laws or modern self-government agreements,
- co-management bodies established under land claims agreements recognized by the Canadian Constitution, and
- Indigenous governing bodies that have entered into an agreement with the Minister under the IAA once regulations for this purposes have been established.[82]

28. Does the IAA respect Indigenous rights and authority?

Somewhat. The Act's purposes include respecting Indigenous rights, and it requires the consideration of Indigenous rights at various stages in assessments, including when deciding whether an assessment is required, when designating projects, and making decisions.[83]

But the Act does not mention UNDRIP or the word "consent," and "Indigenous peoples of Canada" is narrowly defined to mean "Indians, Indian, Inuit and Métis" rather than by reference to their inherent jurisdiction and laws or UNDRIP.

Furthermore, as noted above, the IAA restricts the definition of Indigenous jurisdictions to those established or recognized under Canadian law.

Consulting with Indigenous peoples during the planning phase should help facilitate collaboration on assessments and decisions. However, the Minister is not required to seek to obtain the consent of relevant Indigenous authorities, or enter into government-to-government collaboration agreements on assessments. Therefore it is possible, but not a requirement, for the Minister to recognize and respect Indigenous authority over projects.

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[79] *Ibid*, cl 1, s 93(1).

[80] *Ibid*, cl 1, s 6(1)(f).

[81] *Ibid*, cl 1, s 2, definition of "jurisdiction", (f)-(g).

[82] *Ibid*, cl 1, s 114 (1)((e).

[83] *Ibid*, cl 1, s 6(1)(g), 9(2), 16(2), 22(c), 63(d), 84(a).

29. Does the IAA allow substitution, and if so, does it ensure substitution to the highest standard?

The IAA allows substitution of all assessments, except for those involving the CNSC, CER and offshore petroleum boards.[84] While it imposes some requirements on the Minister when deciding whether to approve a substitution, it will allow for substituted processes that are weaker than processes under the IAA.

To approve a substitution, the Minister must only be satisfied that the substituted process is "appropriate."[85] Substituted processes must consider all the factors that must be considered under the IAA, allow federal authorities and the public to participate, consult Indigenous peoples and allow for multijurisdictional collaboration, and provide public access to records and assessment reports.[86] Lower approval thresholds,[87] lack of public participation funding, fewer opportunities to participate, more restrictive timelines, and weaker information standards are some of the ways that substituted processes may not achieve the standards of an assessment under the IAA.

30. Does the IAA allow delegation?

Yes. The Agency may delegate any part of an Agency-led assessment of a designated project, including writing the report, to any jurisdiction as defined in the IAA,[88] except those of foreign states and international organizations.[89] Note, however, that the IAA creates a number of legal hurdles before Indigenous governing bodies may be considered jurisdictions for this purpose.[90]

There is no limit on which aspects of an assessment the Agency may delegate, meaning that the Act seems to allow the Agency to delegate the entire assessment (but not the final decision) to another jurisdiction.

31. Does the IAA allow equivalency?

No, the IAA does not permit equivalency (which is substitution of both the assessment process and final decision).

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[84] *Ibid*, cl 1, s 31(1),32.

[85] *Ibid*, cl 1, s 31(1).

[86] *Ibid*, cl 1, s 33(1).

[87] In the IAA, it is whether the project is in the public interest, which includes a project's contribution to sustainability, whereas in many other jurisdictions the test is merely whether a project will result in significant adverse environmental effects, and whether those effects are justified in the circumstances.

[88] For example, the government of a province or co-management bodies established under land claims agreements.

[89] Bill C-69*, supra* note 1 at cl 1, s29.

[90] *Ibid*, cl 1, s 114(1)(e).

Regional and Strategic Assessments

32. Does the IAA require regional and strategic assessments?

No, but the Act does enable regional (REA) and strategic (SEA) assessments. Any person may submit a request for a regional or strategic assessment to the Minister, and the Minister must respond to a request within a period of time to be prescribed in regulations.[91] Regional assessments may be done on federal lands, partly on federal lands, or outside federal lands.

33. How will REA and SEA be conducted under the IAA?

The Minister may appoint a committee, or direct the Agency, to conduct an REA or SEA, and must establish their terms of reference.[92] For REAs on federal lands, partly on federal lands or outside federal lands, the Minister must offer to cooperate with any relevant jurisdictions, and may enter into a cooperation agreement for REAs partly on or outside federal lands.[93]

The Act does not contain much detail respecting how REAs and SEAs are to be conducted. The assessment authorities (Agency or committee) must make all information it uses available to the public, provide the public with an opportunity to participate, and provide a report to the Minister when the assessment is completed.[94] There are no requirements regarding participation on REA or SEA terms of reference, no direction that REAs consider alternative scenarios for development and protection in a region, and no provisions requiring the application of REA and SEA outcomes in project assessment or regulatory decision-making (although REA and SEA outcomes must be *considered* in project-level assessments).[95]

However, because meeting Canada's climate change obligations is just one factor to consider in assessments, there is no barrier to approving a project that will significantly hinder meeting such commitments.

Monitoring, Follow-Up and Enforcement

34. What monitoring and follow-up will the IAA require?

Yes. Final decisions must include conditions related to mitigation and follow-up.[96] As noted above, the Agency must also keep follow-up records until the end of the follow-up period, and make those records – or summaries of them – available on the internet site.[97]

The Act does not contain details respecting monitoring or follow-up, or assign responsibility for ensuring those are done. There is also no requirement to evaluate follow-up programs, or that

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[91] *Ibid*, cl 1, s 97.

[92] *Ibid*, cl 1, ss 92, 93, 95, 96.

[93] *Ibid*, cl 1, ss 93(1), 94.

[94] *Ibid*, cl 1, ss 98, 99, 102.

[95] *Ibid*, cl 1, s 22(1)(p).

[96] *Ibid*, cl 1, s 64(4).

[97] *Ibid*, cl 1, s 105(2)€.

the results of follow-up or monitoring be made available following the completion of the follow-up program.

35. Will the public and Indigenous peoples be able to participate in monitoring and follow-up?

The IAA does not contain any provisions respecting the public's ability to participate in follow-up programs, or sit on follow-up committees. It does allow the Minister to enter into agreements with other jurisdictions respecting the carrying out of assessments,[98] but does not clarify whether those agreements may also be in respect of follow-up programs and monitoring. There is no explicit provision for the role of Indigenous guardians in monitoring and follow-up.

36. How will the IAA be enforced?

The Act requires decision-makers to establish binding conditions of approval,[99] and establishes requirements on proponents, such as not to do anything in connection with the project that would cause an environmental effect within federal jurisdiction unless it is acting in accordance with conditions of approval.[100] Where a proponent has convened a provision of the Act, enforcement officers may investigate, issues orders of non-compliance, and order the proponent to take or stop an action.[101]

Proponents that contravene the Act or conditions of approval may face fines of up to $600,000 for individuals, $4,000,000 for small businesses, or $8,000,000 for larger businesses.[102]

However, the Act does not impose consequences on proponents for providing false information or inaccurate predictions about effects. Therefore, there may be no way to hold proponents accountable under the law for incorrect information or predictions that they provide. In particular, the IAA contains no legal mechanism for an IAA approval to be revoked if monitoring indicates that adverse effects will be greater than anticipated or mitigation measures are ineffective, although conditions may be amended.[103]

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[98] *Ibid*, cl 1, ss 114(d)-(f).

[99] *Ibid*, cl 1, s 64.

[100] *Ibid*, cl 1, s 7(3)(b).

[101] *Ibid*, cl 1, ss 122-28.

[102] *Ibid*, cl 1, ss 140(1), 144.

[103] *Ibid*, cl 1, s 68(2).

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