

## ***The New Impact Assessment Process: Fostering Partnerships with Indigenous Peoples***

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On June 20, 2018 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*, passed Third Reading in the House of Commons and was referred to the Senate for First Reading. Second Reading debate has commenced in the Upper Chamber and will most likely be referred to the Energy, Environment and Natural Resources Committee for review.

Part 1 of Bill C-69 (*An Act to enact the Impact Assessment Act*) is intended to repeal the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) and the environmental assessment process it established. The *Impact Assessment Act* (“IAA”), sets out a new impact assessment regime for designated projects.

The impact assessment regime under the IAA differs in several key respects from the environmental assessment process under the CEAA 2012 (see our previous article on Bill C-69 titled: [Brace for Impact \(Assessments\) – Government of Canada Tables Omnibus Environmental Bill](#)). One such difference is the way in which the IAA includes Indigenous peoples in the impact assessment process. Proponents of designated projects should pay close attention to the IAA as their consultation and information gathering obligations have changed.

### **Impact Assessments Under the IAA**

Unlike the CEAA 2012, the IAA explicitly announces the Canadian Government’s commitment to fostering reconciliation and partnerships with Indigenous peoples and implementing the United Nations Declaration on the Rights of Indigenous Peoples.<sup>1</sup> One purpose of the IAA is to ensure respect for the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of impact assessments and decision-making.<sup>2</sup> From the outset, the language of the IAA requires a stronger commitment to involve Indigenous peoples in the impact assessment process.

### **The Planning Phase**

The IAA eliminates the screening phase that exists under the CEAA 2012 and replaces it with a “planning phase.” At the planning phase, the proponent of a designated project must provide the Impact Assessment Agency of Canada (“the Agency”) with a project description and certain

<sup>1</sup> 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, s 1 (*Impact Assessment Act*, Preamble).

<sup>2</sup> *Ibid* (IAA, s 6).

information required by the regulations.<sup>3</sup> The Agency will review this information and determine whether the designated project requires an impact assessment.

The IAA expressly involves Indigenous peoples at the planning stage to an extent that is not provided for in the screening phase under the CEAA 2012. The IAA requires the Agency to consult with any Indigenous groups that may be affected by the carrying out of the designated project.<sup>4</sup> In making a decision as to whether a designated project requires an impact assessment, the Agency must take into account any adverse impacts that the designated project may have on the rights of Indigenous peoples.<sup>5</sup> The Agency must also take into account any comments received by the Indigenous groups that it consulted.<sup>6</sup>

### **The Information Gathering Phase**

If a designated project requires an impact assessment, the Agency must provide the proponent with a list of the information the proponent is required to submit to the Agency in order for the Agency to carry out the impact assessment.<sup>7</sup> This information includes the proponent's plans for engaging with Indigenous peoples.<sup>8</sup> If the proponent fails to provide this information within the specified time limits, the impact assessment will be terminated.<sup>9</sup>

### **The Impact Assessment Phase**

The Agency (or a review panel where the Minister has referred the assessment to a review panel) “must offer to consult and cooperate with respect to the impact assessment of the designated project” with a variety of “jurisdictions”, including:

- ◆ any body — including a co-management body — established under a land claim agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project
- ◆ an Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project either under a land claim agreement referred to in section 35 of the *Constitution Act, 1982* or under an Act of Parliament or the legislature of a province, and
- ◆ an Indigenous governing body that has entered into an agreement or arrangement referred to in paragraph 114(1)(e).<sup>10</sup>

<sup>3</sup> *Ibid* (IAA, s 10).

<sup>4</sup> *Ibid* (IAA, s 12).

<sup>5</sup> *Ibid* (IAA, s 16(2)(c)).

<sup>6</sup> *Ibid* (IAA, s 16(2)(d)).

<sup>7</sup> *Ibid* (IAA, s 18(1)).

<sup>8</sup> *Ibid* (IAA, s 18(1)(b)).

<sup>9</sup> *Ibid* (IAA, s 20(1)).

<sup>10</sup> *Ibid* (IAA, ss 2, 21). The agreements referred to in paragraph 114(1)(e) are agreements that provide that the Indigenous governing body is to be considered a jurisdiction for the purpose of the *IAA*. The agreements also authorize the Indigenous governing body to exercise power or perform duties or functions in relation to impact assessments under the *IAA*.

If the Minister refers the impact assessment to a review panel, the Minister is responsible for appointing the panel's members. The Minister must appoint at least one person to the panel who has knowledge or experience relevant to the designated project's anticipated effects or has knowledge of the interests and concerns of the Indigenous peoples that are relevant to the assessment.<sup>11</sup>

In carrying out the impact assessment, the Agency or review panel *must* take into account a number of factors, such as:

- ◆ the impact that the designated project may have on any Indigenous groups and their rights as recognized and affirmed by section 35 of the *Constitution Act, 1982*
- ◆ Indigenous knowledge provided with respect to the designated project
- ◆ considerations related to Indigenous cultures raised with respect to the designated project
- ◆ any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body, and
- ◆ any study or plan conducted or prepared by a jurisdiction or Indigenous governing body.<sup>12</sup>

Under the CEAA 2012, consideration of Indigenous knowledge was optional.<sup>13</sup> The IAA makes it mandatory for an impact assessment to consider Indigenous knowledge.

After considering the required factors, the Agency or review panel must submit a report to the Minister setting out the effects the Agency concludes the designated project is likely to cause if the designated project is carried out.<sup>14</sup> The report must state how the Agency or review panel, in determining these effects, took into account and used any Indigenous knowledge that was provided.<sup>15</sup>

### **The Decision-Making Phase**

When making a decision under section 60(1) whether the designated project is in the public interest, the Minister must base his/her decision on the report provided by the Agency or review panel and consider the following factors:

- ◆ the extent to which the designated project contributes to sustainability
- ◆ the extent of the adverse effects
- ◆ the implementation of mitigation measures

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<sup>11</sup> *Ibid* (IAA, s 41(1)).

<sup>12</sup> *Ibid* (IAA, s 22(1)).

<sup>13</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s 19(3).

<sup>14</sup> Bill C-69, *supra* note 1, s 1 (IAA, ss 28(2) 51(1)(d)).

<sup>15</sup> *Ibid* (IAA, ss 28(3.1), 51(1)(d)(ii.1)).

- ♦ the impact that the designated project may have on any Indigenous groups and any adverse effects on the rights of Indigenous peoples

the extent to which the effects hinder or contribute to the Canadian Government's ability to meet its environmental obligations and its commitments in respect of climate change.<sup>16</sup>

### **Substituted and Regional Assessments**

In some circumstances (and in meeting the objective of “one project, one assessment”), the Minister may substitute the impact assessment process for a process for assessing the effects of designated projects designed by certain “jurisdictions”, including those Indigenous governing bodies listed above.<sup>17</sup> This substitution provision may allow the Minister, where the Minister deems appropriate, to substitute the impact assessment process with Indigenous assessment processes.

The IAA also provides for regional assessments.<sup>18</sup> Regional assessments allow for the assessment of cumulative effects at a regional scale, which can provide for a more comprehensive analysis of the effects of a designated project.<sup>19</sup> Where the regional assessment is carried out in a region that is outside of federal lands or is only partly composed of federal lands, the Minister may enter into an agreement with certain “jurisdictions” (including those listed above) respecting the joint establishment of a committee to conduct the regional assessment.<sup>20</sup>

Regional assessments may also be carried out by the Agency. Where the Agency conducts a regional assessment, the Agency must offer to consult and cooperate with the “jurisdictions” listed above.<sup>21</sup>

### **Indigenous Jurisdictions and IA**

In recognising the authority of Indigenous jurisdictions to conduct assessments and providing for co-governed regional assessments impact assessments could more closely reflect the IA processes currently followed under modern land claims agreements north of 60.

In addition, the IAA is recognizing situations elsewhere in Canada where First Nations are exercising Indigenous jurisdiction.

The KGHM Ajax Project (the “Project”) is one recent example where a First Nation conducted its own impact assessment. KGHM Ajax Mining Inc. proposed the construction and operation of a 1,700 hectare open pit copper and gold mine near Kamloops, British Columbia. The Project

<sup>16</sup> *Ibid* (IAA, ss 60(1)(a), 63).

<sup>17</sup> *Ibid* (IAA, s 31(1)).

<sup>18</sup> *Ibid* (IAA, ss 92–93).

<sup>19</sup> Government of Canada, “Basics of Environmental Assessment”, online: <<https://www.canada.ca/en/environmental-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html#reg01>>.

<sup>20</sup> Bill C-69, *supra* note 1, s 1 (IAA, s 93(1)(a)(i)).

<sup>21</sup> *Ibid* (IAA, s 94).

would be located within the asserted traditional territories of Tk'emlúps te Secwépemc (Tk'emlúps Indian Band) and Skeetchestn Indian Band.<sup>22</sup>

The Canadian Environmental Assessment Agency (the “CEA Agency”) and the British Columbia Environmental Assessment Office (the “EAO”) jointly carried out an environmental assessment of the Project. The Stk'emlupsemc te Secwépemc Nation (the “SSN”) represented both the Tk'emlúps Indian Band and the Skeetchestn Indian Band throughout the environmental assessment.<sup>23</sup> Based on input from the SSN, the CEA Agency modified the environmental assessment process to include the SSN's consultation objectives and increased opportunities for SSN's participation.<sup>24</sup> The CEA Agency also committed to sharing the outcome of the SSN's assessment process with the federal decision-maker.<sup>25</sup> However, the CEAA process for the Project did not include a Panel Review, though requested by the SSN.

In July 2015, the SSN formally initiated the development of its own community-based assessment called the SSN Assessment Process.<sup>26</sup> The Assessment Process included a Panel Hearing which reviewed the potential effects of the Project on the SSN's Aboriginal interests.<sup>27</sup> The Panel made recommendations to the SSN joint council which, in turn, made a decision not to consent to the Project.

The BC and federal decisions came after the SSN decision. At the conclusion of the BC environmental assessment process, the Ministers turned down the Project.

The federal Minister of the Environment determined that the Project was likely to result in significant adverse environmental effects on Indigenous heritage and to the use of lands and resources for traditional purposes by the SSN.

Providing greater Indigenous involvement including participation on hearing panels and the opportunity for substituted or co-governed IA processes may better achieve the objective of having “one project, one assessment”. However it will take resources (both human and financial) and a commitment from each jurisdiction to ensure that duplication is truly avoided, that Indigenous peoples are meaningfully involved and that process and decision timeframes are reasonable.

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<sup>22</sup> Canadian Environmental Assessment Agency & British Columbia Environmental Assessment Office, “Joint Federal Comprehensive Study/Provincial Assessment Report – Ajax Mine Project”, 2017, at 262, online: < <https://www.ceaa-acee.gc.ca/050/documents/p62225/119687E.pdf>>.

<sup>23</sup> *Ibid* at 262.

<sup>24</sup> *Ibid* at 270.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at iv.

<sup>27</sup> *Ibid*.

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