

The New Federal Impact Assessment Act: Implications for Energy Projects



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Outline

- 1. Background & Intro to the new *Impact Assessment Act***
- 2. Structure and Application of the Act**
- 3. Key new features**
- 4. Implications for energy projects**
- 5. Look ahead**



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Impact Assessment to the rescue?

First Session, Forty-second Parliament,
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

HOUSE OF COMMONS OF CANADA

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

AS PASSED

BY THE HOUSE OF COMMONS

JUNE 20, 2018

What is EA/IA?

- “Environmental impact assessment is, in its simplest form, a planning tool... as a planning tool it has both an information-gathering and a decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development...
- *Friends of the Oldman River Society v. Canada*, [1992] 1 SCR 3
- “identification and evaluation of actual or potential effects (positive and adverse) of an undertaking on the environment”
– *Noble*, 2015
- **“Look before you leap”**

Road to Bill C-69

- Expert Panel
- Consultation process
- Expert Report
- Discussion paper
- Bill C-69 readings
- Senate Review
- *Impact Assessment Act* and initial regs
- Regulations and guidance (still underway)

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Bill C-69 is history...

Now the *Impact Assessment Act*, S.C. 2019, c.28



CANADA

CONSOLIDATION

CODIFICATION

Impact Assessment Act

Loi sur l'évaluation d'impact

S.C. 2019, c. 28, s. 1

L.C. 2019, ch. 28, art. 1

NOTE

[Enacted by section 1 of chapter 28 of the Statutes of Canada, 2019, in force August 28, 2019, see SI/2019-86.]

NOTE

[Édictée par l'article 1 du chapitre 28 des Lois du Canada (2019), en vigueur le 28 août 2019, voir TR/2019-86.]

Current to June 17, 2020

Last amended on August 28, 2019

À jour au 17 juin 2020

Dernière modification le 28 août 2019



Impact on Energy Projects?



CANADA

CONSOLIDATION

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Impact Assessment Act

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What is EA/IA?



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Impact Assessment Act: basic structure



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Impact Assessment Act: basic structure/application

- Thresholds up = fewer projects designated
- In situ listed but exempt because of cap

Electrical Transmission Lines and Pipelines

41 The construction, operation, decommissioning and abandonment of a new *pipeline*, as defined in section 2 of the [Canadian Energy Regulator Act](#), other than an offshore pipeline, that requires a total of 75 km or more of new right of way.

Mines and Metal Mills

18 The construction, operation, decommissioning and abandonment of one of the following:

- (a) a new coal mine with a coal production capacity of 5 000 t/day or more;

19 The expansion of an existing mine, mill, quarry or sand or gravel pit in one of the following circumstances:

- (a) in the case of an existing coal mine, if the expansion would result in an increase in the area of mining operations of 50% or more and the total coal production capacity would be 5 000 t/day or more after the expansion;

32 The construction, operation, decommissioning and abandonment of a new *in situ* oil sands extraction facility that has a bitumen production capacity of 2 000 m³/day or more and that is

- (a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province; or

Fed-Prov Jurisdiction:

- Constitution is silent on environment
- Jurisdiction is shared and overlapping
- Fed and provs may act on respective authorities in the Constitution
- “Provincial project” is a false notion; jurisdiction is shared
- Courts interpret laws through “cooperative federalism” lens
- IAA structured to align with federal jurisdiction

***Friends of the Oldman River Society v. Canada* [1992] 1 SCR 3**

- Constitutional? Yes.
 - Constitutional authority derived from fed authority over subject matter
 - Subject matter brings fed in as decision-maker, then can consider all effects
 - If area of federal jurisdiction (e.g. fisheries, navigation) then minimal limits on issues to be considered (“integrated assessment”)
 - Fed assessment to assess entire project “as proposed”

Federal Powers	Provincial Powers
Seacoast and inland fisheries – s. 91(12)	Direct taxation within province - s. 92(2)
Navigation and shipping – s. 91(10)	Local works and undertakings – s. 92(10)
Taxation – s.91(3)	
Spending power – s.91(1A)	
Criminal Law – s. 91(27)	Licensing to raise revenue – s. 92(9)
Trade and commerce – s. 91(2)	Property and civil rights – s. 92(13)
Military and Defence – s. 91(7)	Local or private matters – s. 92(16)
Bankruptcy and Insolvency – s. 91(21)	Municipal institutions – s. 92(8)
“Indians, and Lands reserved for the Indians” – s.91(24)	Natural Resources – s. 92A
Residual power - POGG	Owner of pub. lands & resources – s. 109

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- Federal jurisdiction is sound and broad, but ABCA reference case and ensuring SCC opinion will be valuable added clarity.



Factors — impact assessment

22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:

- (a) 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,
 - (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;
- (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
- (c) 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;
- (d) the purpose or purposes for the designated project;
- (e) 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;
- (f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;
- (g) Indigenous knowledge provided with respect to the designated project;
- (h) the extent to which the designated project contributes to sustainability;
- (i) 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;
- (j) any change to the designated project that may be caused by the environment;
- (k) the requirements of the follow-up program in respect of the designated project;
- (l) considerations related to Indigenous cultures raised with respect to the designated project;
- (m) community knowledge provided with respect to the designated project;
- (n) comments received from the public;
- (o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;
- (p) any relevant assessment referred to in section 92, 93 or 95;
- (q) 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;
- (r) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition *jurisdiction* in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;
- (s) the intersection of sex and gender with other identity factors; and

Key IAA Factors and Considerations: Climate Change

Impact Assessment Act

- s.22(i) “must take into account”
- s.63 (e) “must include a consideration of”
 - “...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;



Key IAA Factors and Considerations:

- Analysis of ghgs is not new
- Explicit requirement is new
- IAA an attempt to bring order and consistency

Impact Assessment Act - SACC/guidance

- Features of note:
 - Downstream emissions – No (i.e. combustion of product not considered...)
 - “Displaced Emissions Internationally” – Yes
 - “Corporate level action” - Yes
 - Emissions intensity for comparison purposes
 - Upstream emissions -
 - Unlimited access to offsets – may generate, may obtain
 - Net-zero “credible plan” required
 - Specifics detailed in TISGs
 - Agency to analyze how project emissions relate to other policies and climate targets
 - **No bright line climate test; no hard limit**

Key IAA Factors and Considerations: Economic Changes

Impact Assessment Act – positive/negative changes in economic conditions

- s.22(1)(a) – IA must take into account ‘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
- Guidance
 - The positive and adverse consequences of a designated project on components of the economy at the local, regional, and national levels
 - Including: labour, capital, business and investment, consumer spending, government spending, land and resources
 - Including: direct and indirect
- Implemented through ‘economic impact analysis’
- Integrated into final decision-making through several public interest factors

Key IAA Factors and Considerations: Sustainability

Impact Assessment Act – contribution to sustainability

- s.22(h) IA “must take into account”
- s.63 (a) Public interest determination “must be based on... consideration of”
 - “... the extent to which the designated project contributes to sustainability;

Impact Assessment Act – contribution to sustainability

- What is sustainability under the IAA? – See Guidance
 - “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”
- What does this mean in practice?
 - “Sustainability principles”: interconnectedness and interdependence of human-ecological systems; well-being of present and future generations; positive effects and reduce adverse effects of a designated project; and precautionary principle and uncertainty and risk of irreversible harm.
 - “In a proponent’s Impact Statement Report, proponents should describe the extent to which a project contributes to sustainability. It is recommended that a proponent apply the methodology outlined in the Framework...”



Impact Assessment Act – contribution to sustainability

- What does this mean in practice? – See detailed framework methodology

Key IAA Factors and Considerations: Indigenous Engagement, Consultation and "Consideration"

○ Planning Phase:

- Agency must **offer to consult** with "any Indigenous group that may be affected" by the proposed project (s.12)
- Agency's **summary of issues** raised by any Indigenous group must be provided to the project proponent (s 14(1)); summary must be posted on the Agency's internet site (s 14(2))
- Agency **screening decision** must consider "any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada" (s.16(2)); any comments received... from any Indigenous group consulted under s.12
- Informs Indigenous Engagement and Partnership Plan issued at end of planning phase, which included Proponent-led engagement

■ Indigenous Participation and Consultation

○ **Mandatory factors to be considered (s.22):**

- 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 (s 22(1)(c));
- **Indigenous knowledge** provided with respect to the designated project (s 22(1)(g));
- considerations related to **Indigenous cultures** raised with respect to the designated project (s 22(1)(l));
- 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 (s 22(1)(q))
- **Study or plan by an Indigenous government body** in respect of a region related to the designated project (s 22(1)(r))
- **Discretion** – Each factor must be ‘taken into account’ but scope of each factor is determined by Agency (s.18(1.2))

- **Agency's objects**

- “Coordinate” consultation with Indigenous groups that may be affected by the designated project (s.155(b))
- “Engage in consultation” with the Indigenous peoples of Canada on policy issues related to the Act (s. 155(i)) (this is virtually identical to s 105(g) of CEAA, 2012).

- **Duty to consult and accommodate**
 - IAA does not and cannot change Crown obligations
 - IAA does provide additional explicit guideposts in each IA phase
 - Crown may (and will) rely on engagement processes and activities under the IAA to fulfil duty to consult and accommodate
 - IAA implements some of the clarity from previous legal challenges, keeping a phased approach that includes late-phase consultation after the IA is complete (i.e. during decision-making phase)
 - Project cannot be in the public interest if Crown consultation obligations were not satisfied
 - Consent not required under the IAA, just meaningful consultation
 - Indigenous rights and interests one factor to be “considered” in final public interest determination

IAA Final Decision-Making

“Consideration” of the rights of Indigenous Peoples

- **Decision-making – the public interest determination**
 - s.63 - Final decision “must include a consideration of”:
 - *(d) 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;*
 - s.65(2) – reasons for determination must demonstrate consideration of all factors in s.63
 - Cabinet retains final unilateral decision-making power

- **IAA and Indigenous consent**
 - **Explicit reference to UNDRIP implementation but...**
 - Unilateral final decision-making power left with Crown
 - Despite bulked up guide-posts and procedural requirements, Indigenous rights and interests boil down to “considerations”
 - Canada’s view of UNDRIP/FPIC implementation = good faith effort with an “aim” to obtain consent
 - Indigenous no ≠ no

IAA Final Decision-Making

Public interest determination:

- Sustainability
- Adverse effects
- Mitigation measures
- Impact on Indigenous rights
- Climate change

Factors — public interest

63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

(a) the extent to which the designated project contributes to sustainability;

(b) 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;

(c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;

(d) 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

(e) 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.



Decision Statement

Decision statement issued to proponent

65 (1) The Minister must issue a decision statement to the proponent of a designated project that

- (a)** informs the proponent of the determination made under paragraph 60(1)(a) or section 62 in relation to that project and the reasons for the determination;
- (b)** includes any conditions that are established under section 64 in relation to the designated project and that must be complied with by the proponent;
- (c)** sets out the period established under subsection 70(1); and
- (d)** includes a description of the designated project.

Detailed reasons

(2) The reasons for the determination must demonstrate that the Minister or the Governor in Council, as the case may be, based the determination on the report with respect to the impact assessment of the designated project and considered each of the factors referred to in section 63.

What to watch:

1. Emerging guidance – e.g. technical, public interest determinations
2. Emerging proponent and agency analyses (e.g. project ghg emissions)
3. “Reasons” provided with final IAA decisions
4. Reference cases re IAA and GGPPA
5. Judicial interpretation of key provisions
6. Role of IAA in post-Covid recovery
7. Public trust and confidence restored?

Conclusions

1. IAA is a renovation but not rebuild of CEAA 2012
2. Likely fewer projects assessed
3. Projects that do get assessed will face onerous process
4. Expanded assessment factors; reopening of public participation
5. Much room for energy projects to meet or exceed requirements
6. Virtually no bright line tests; no no-go rules
7. Requirement for “detailed reasons” will help with growing pains
8. Political accountability remains central



Commentary



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Draft Strategic Assessment of Climate Change: Big Steps for Impact Assessment, Baby Steps for Climate Change

Posted on [December 13, 2019](#) by [David V Wright](#)

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