

## What Should You Know About the Coming Into Force of the *Impact Assessment Act*?

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As of the end of August 2019, Canada has a new environmental assessment regime – the *Impact Assessment Act*.<sup>2</sup> Concurrent with the coming into force of the Act were two important regulations. The *Physical Activities Regulations*<sup>3</sup> designate proposed projects which the Impact Assessment Agency will have to consider for assessment. The *Information and Management of Time Limits Regulations*<sup>4</sup> sets out the information proponents must include in the initial and more detailed project description and the time frames during the initial planning phase and subsequent stages of the assessment. This description now specifically requires estimates of any greenhouse gas and other emissions and wastes associated with any phase of the project.

The government was faced with a dilemma. How to reinvigorate the assessment process so that trust was established with industry, non-governmental organizations (NGO's) and First Nation communities. Industry found the process inefficient and unpredictable particularly in bringing natural resources to market. NGO's and indigenous groups considered regulators with significant control of the assessment process captive to proponents and sought transparency.

The new legislation transfers greater oversight of the process to an independent Impact Assessment Agency (Agency). It formalises what should, in any event, be taking place behind the scenes, imposing more demands for information and consultation with the public, First Nations and other relevant governing jurisdictions through an initial planning phase, supervised by the Agency. The Agency uses the planning phase to determine whether an assessment is required and to identify issues, requisite information and studies and finally, set the scope of the assessment. Criteria for suspending time frames during the assessment phase have been narrowed, but practically, this may just transfer the time for obtaining additional information and study from the assessment phase to the initial planning phase. Uncertainty in the assessment process may prove to increase by the expansion of assessment and the decision-making process beyond significant adverse environmental effects. Now the Agency, Review Panel and ultimately the Minister of Environment and federal cabinet must consider in the assessment, review and approval process changes to health, social or economic conditions. The Act now explicitly requires in the case of designated energy projects regulated under the Nuclear Safety and Canadian Energy Acts, that the Review Panel consider the need for the project, alternatives to it, the extent to which the project contributes to sustainability, the

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<sup>2</sup> S.C. 2019, c.28

<sup>3</sup> SOR/2019-285.

<sup>4</sup> SOR/2019-283.

extent to which the project hinders or contributes to Canada's ability to meet its environmental obligations and commitments in respect of climate change and the intersection of sex and gender with other identity factors.

The Act's preamble recognizes the Canadian government's commitment to implementing the *U.N. Declaration on the Rights of Indigenous Peoples* which has numerous clauses recognizing that Indigenous Peoples have a right to free, prior and informed consent. Section 3 of the new Act, however, states that nothing in the Act shall be construed as abrogating or derogating from the protection provided for the rights of the Indigenous Peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*. The Supreme Court of Canada in cases like the *Chippewas of the Thames First Nation v. Enbridge Pipelines*,<sup>5</sup> has emphasized that those rights involve the Crown's duty to consult to obtain consent, without imposing a duty to obtain consent. That said, throughout the planning phase, the assessment phase and the final decision-making public interest stage, the rights of indigenous peoples must be seriously considered.

With respect to transition between the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and the *Impact Assessment Act*, projects submitted for assessment under the former Act continue under CEAA 2012 with the caveat that if a decision as to whether or not an assessment is required before the *Impact Assessment Act* came into force, then the submitted project will be terminated and the project will be considered under the new *Impact Assessment Act*.

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<sup>5</sup> 2017 SCC 41 at para. 59.