

Legal update

Review of the environmental assessment processes

April 2017 Environmental

The Canadian Minister of the Environment and Climate Change was tasked with reviewing the environmental assessment processes set out in the *Canadian Environmental Assessment Act, 2012*. To this end, an expert panel (the Panel) was set up to conduct consultations that led to a report setting out the Panel's recommendations being submitted to the Minister. The report, entitled *Building Common Ground: A New Vision for Impact Assessment in Canada*,¹ was published on April 5, 2017. Comments may be submitted on the report until May 5, 2017.² Legislative and regulatory amendments could then be tabled in late 2017 or early 2018.

Despite claims of modest change, the federal Panel's recommendations propose profound shifts in environmental assessment in Canada – not even the name "environmental assessment" would remain. Despite some sound recommendations, if they were all adopted, assessment in Canada would become more complex and unpredictable and require longer timelines. The principle of "one project, one review" is endorsed in name, but abandoned in practice, as multi-jurisdictional and "tri-partite" coordination is championed instead. Testing for significant adverse environmental effects would be replaced by considering contributions towards sustainability – now defined by five pillars, not three. A new quasi-judicial administrative agency is proposed to conduct hearings, with greater involvement of federal resources, extending from compelling scientists to archiving project study data. The "standing" test introduced in 2012, common to other administrative tribunal processes, would be eliminated, but informal participation mechanisms would be enhanced. Standard process timelines would likewise be removed and replaced by timelines established on a project-specific basis.

In addition to transforming basic environmental assessment mechanisms, the Panel's proposed changes would significantly affect federal consultation with Indigenous Peoples. For example, the review process would explicitly seek Indigenous "consent," subject to appeal to a review panel that would assess the reasonableness of withheld consent. The new agency would also lead Crown consultation as an agent of the Crown, despite being the quasi-judicial agency charged with assessing the adequacy of such consultation.

Overall, the sweeping changes proposed provide a large menu for government to select from when it proposes legislation later this year or early next year. We expect that drafting will also draw on similar ongoing reviews of the *National Energy Board Act*, the *Fisheries Act*, and the *Navigation Protection Act*.

The details of the proposed changes follow below.

The panel's report has three main sections:

The Panel's vision

The Panel does not want to propose an entirely new environmental review process, aiming instead for something between the process implemented through the first iteration of the *Canadian Environmental Assessment Act* passed in 1992 and the one in place since the enactment of the *Canadian Environmental Assessment Act, 2012*.

Consideration is being given to a more all-encompassing approach that would move from environmental assessment (EA) to impact assessment (IA) and give prominence to a project's potential impacts, positive and negative, on the environment, society, economy, health and culture (what the Panel considers to be the five pillars of sustainability).

The new process should also be governed by four fundamental principles. It must be:

- **Transparent:** the public must be able to see and understand how the process is being applied, how assessments are being undertaken and how decisions are being made;
- **Inclusive:** the concerns of all parties who consider themselves or their interests to be affected by a project must be taken into account;
- **Informed:** information must be presented in a way people can understand; technical scientific information must be translated into plain language; information and data must be easily accessible; and Indigenous knowledge and community knowledge must be integrated with science as the foundation for decision-making; and
- **Meaningful:** interveners in the process must be given a real opportunity to be heard and have a chance to influence the ultimate decision.

Developing the vision

Purpose of the federal impact assessment

To respect the division of powers set forth in Canada's constitution, the Panel feels that IAs should only be conducted on a project, plan or policy that has clear links to matters of federal interest, including federal lands, federal funding and the federal government as a proponent, as well as impacts on matters under federal jurisdiction.³

Cooperation among government jurisdictions

In the Panel's opinion, when multiple IA processes apply, the mechanism for co-ordination should be co-operation, whether with provincial, territorial or Indigenous authorities. That means that, insofar as possible, jurisdictions should strive for "one project, one assessment," but conduct their own IA. General or project-specific co-operation agreements with provinces and territories are also recommended. In addition, where Indigenous governments have assessment responsibilities, tri-partite arrangements should be negotiated.

The Panel feels that substitution⁴ could continue to be available if the highest IA standards are applied. However, the Panel does not view equivalency⁵ as a viable option.

Indigenous considerations

The Panel recommends enhancing Indigenous participation and consultation, particularly with respect to impacts on Aboriginal and treaty rights and other Indigenous interests. The new IA regime should be fundamentally based on collaborative consent, with Indigenous Peoples on par with other levels of government, and Indigenous Peoples should be able to adapt the process to reflect their traditions, customs, laws and aspirations.

Public participation

The Panel recommends that public participation begin early in, and continue throughout, the IA process. Sufficient notice in advance of participation opportunities should be given and accessible, non-technical summaries should be made available to facilitate increased public understanding of projects undergoing an IA. In addition, IA information should be permanently and publicly available on a public registry through an easily accessible interface.

Evidence-based impact assessment

The Panel recommends developing a central, consolidated and publicly available federal government database to house all baseline and monitoring data collected for IA purposes. The federal IA authority should lead and verify the accuracy of studies conducted in connection with the process. Decisions should reference the key evidence they rely upon, including the criteria and trade-offs used.

Implementing the vision

Governance model

According to the Panel, IA should be entrusted to a single authority (Impact Assessment Commission) that would make decisions on behalf of the federal government and could be established as a quasi-judicial tribunal with powers to facilitate the resolution of disputes arising during the IA process, mediate such disputes and hold hearings. Decisions made by the Commission could, however, be overruled on appeal to the Governor in Council.

Project impact assessment

An IA would be required where a project appears on a new project list. An IA would be required for projects that do not appear on the list if those projects are likely to have a consequential impact on present and future generations (based on a list of criteria to be determined) or if members of the public request that a project require a federal project IA (criteria also to be determined).

According to the Panel, IA would involve three phases: a planning phase, a study phase and a decision phase.

The planning phase would provide a face-to-face opportunity for interested parties, forming a project committee, to identify their issues of concern to the proponent, provide input on the project design and establish terms for the IA. A government expert committee would also be formed to provide access to government expertise throughout the process.

The study phase would be used to prepare the impact statement. The development of the Impact Statement would be led by a team of experts retained by the Commission. A draft of the impact statement would be released for review by the project committee and the government expert committee and there would also be Indigenous consultation and a public comment period.

The Commission would then prepare a summary report laying out the issues of consensus. Where there is consensus on all important issues, an order setting out the terms of consensus would be issued and would constitute the decision. Where there are important issues of non-consensus, a review panel would be appointed to make the decision. The review panel would hold a hearing on all issues of non-consensus and make a conclusion on each issue. It would also make an overall decision about the project.

Monitoring, compliance and enforcement

A post-IA phase should be provided for in the legislation to address monitoring and follow-up related to conditions, as well as compliance and enforcement. To facilitate this phase, outcome-based conditions are required for project implementation. It should also be possible to review and amend these conditions, as applicable, to take new into account the adoption of new standards. Mandatory monitoring and follow-up programs should be provided for and Indigenous Groups and local communities should be involved in independent oversight. Monitoring and follow-up data should be posted on a public registry. Lastly, legislation should provide a broad range of effective tools to enforce conditions (financial penalties, administrative monetary penalties, suspension and revocation of an approval).

Time and costs

The Commission would be required to provide an estimate of the cost and timeline for each of the three phases of the assessment and the estimate would be made public. The Panel recommends that IA timelines be established on project-by-project basis that takes into account each project's specific context and issues.

Regional impact assessment

According to the Panel, there are two cases where regional IAs should be required: (1) on federal lands or marine areas with the potential for cumulative impacts, and (2) outside of federal lands and marine areas where there is a potential for, or existing, cumulative impacts on many federal interests. These regional IAs would also follow the recommended three-phase process (planning phase, study phase and decision phase).

Project IAs would then be streamlined where a regional IA has already been conducted. The results and requirements of the regional IA should be incorporated into subsequent federal permits or approvals that do not require a project IA.

Strategic impact assessment

The Panel recommends that a strategic IA would be required where new or existing federal policies, plans and programs (1) are likely to affect many projects subject to federal IA, and (2) lack clear guidance on how they should be applied in a project or regional IA.

Climate change

The Panel recommends that a strategic IA be conducted to establish thresholds and targets for greenhouse gas emissions for a particular sector, industry or region to ensure that any development aligns with Canada's climate change commitment. These thresholds and targets could then be made binding in project IA.

Conclusion

Anyone who wishes to share their views on the Expert Panel report and recommendations can do so until May 5, 2017 on the following Government of Canada website: <http://www.letstalkea.ca>.

In addition to the environmental assessment processes review, the Government of Canada has also launched reviews focusing on the modernization of the National Energy Board and on restoring lost protections and introducing modern safeguards to the *Fisheries Act* and the *Navigation Protection Act*.⁶

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Footnotes

1. The report is available at <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>.
2. Anyone who wishes to share their views on the Expert Panel report and recommendations can do so on the following Government of Canada website: <http://www.letstalkea.ca>.
3. The Expert Panel lists the following as federal interests: species at risk, fish, marine plants, migratory birds, Indigenous Peoples and lands, greenhouse gas emissions of national significance, watershed and airshed effects crossing provincial and national boundaries, navigations and shipping, aeronautics, activities crossing provincial and national boundaries and works related to those activities and activities related to nuclear energy.
4. There is substitution when there is a single IA process subsequent to which each jurisdiction maintains its decision-making authority.
5. There is equivalency when, in the presence of two processes that are considered equivalent, a single assessment process is conducted and only the jurisdiction that led the process makes a decision.
6. Further information on these reviews is available on the Government of Canada website <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html>.

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