



Environmental Impact Assessment:

A Legal Toolkit for Newfoundland & Labrador

This volume of the East Coast Environmental Law Summary Series provides an overview of the federal and provincial environmental impact assessment processes for Newfoundland and Labrador. The volume highlights key opportunities for public involvement. The goal of this publication is to assist members of the public in their understanding of the environmental impact assessment process and where they can contribute within it.

Definitions of words used in this publication can be found at the end of the document. This publication, as well as past volumes of our Summary Series and other environmental legal resources, can be found on our website at www.ecelelaw.ca.

Environmental Impact Assessment: An Overview

What is Environmental Impact Assessment ("EIA")?

Environmental impact assessment ("EIA") is a planning process to consider the potential environmental effects of a proposed project before it is carried out. EIA seeks to anticipate adverse effects, design measures to mitigate those effects, and predict whether the impacts, even after mitigation, will be significant. In cases when the EIA shows that significant impacts will arise, the project may not proceed or will proceed under conditions or modifications to minimize its negative effects. EIA may also be used to explore the project's potential socioeconomic impacts, including its effects on employment, local economy, and cultural traditions.

EIAs were first performed in Canada in the 1970s; however, it was not until the 1990s that EIA laws were adopted in Canada. The original federal law was the *Canadian Environmental Assessment Act* ("CEAA"), which was introduced in 1992. CEAA has been amended several times over the years, and in 2019 it was replaced by the *Impact Assessment Act* ("IAA").

Provincially, the Newfoundland & Labrador *Environmental Protection Act* ("EPA") and its *Environmental Assessment Regulations* govern the EIA process. Provincial EIAs are administered by Newfoundland and Labrador's Minister of Municipal Affairs and Environment.

Do not confuse "environmental impact assessment", with:

"environmental impact statement" or "environmental assessment report", which are documents produced, usually by consultants, to describe the potential environmental effects of a proposed project as part of the EIA process;

"environmental site assessment", which is a report that assesses the extent and nature of potential environmental contamination liabilities of a site (this can be done on any piece of real estate and is not part of the EIA process described in this publication); or

"environmental audit", which is an evaluation used to identify environmental management and regulatory compliance of a specific operation and is not part of the EIA process.

Why is there a federal law and a provincial law to address EIA?

The authority to make laws is divided between the Parliament of Canada and the provincial legislatures. Article 91 of the *Canadian Constitution* defines the legislative authority of the federal government; Article 92 does the same for the provinces. There are also areas of shared jurisdiction, such as immigration and agriculture. Anything local and private in nature falls under the jurisdiction of the provinces, along with provincial Crown lands and natural resources. Criminal law, navigation, fisheries, and interprovincial and international trade fall under the jurisdiction of the federal government. As a result, the environment does not fall solely under federal or provincial

jurisdiction, and both federal and provincial governments have established environment departments. Where an activity falls within a federal area of constitutional jurisdiction, a federal impact assessment may be required; where it falls within a provincial area of constitutional jurisdiction, a provincial environmental impact assessment may be required. Sometimes both are required.

The Federal Impact Assessment Process

What is the *Impact Assessment Act*?

The *Impact Assessment Act* (“IAA”) significantly amended the federal government’s approach to EIAs. Where *CEAA*’s primary role was assessing, avoiding, and mitigating “significant adverse environmental effects”,¹ the *IAA*’s scope is broader than just environmental considerations and requires an assessment of both cultural and social impacts as well.² This change is not only reflected in the *IAA*’s title and the shift from the Canadian Environmental Assessment Agency to the Impact Assessment Agency (the “Agency”), but it is also reflected by the core considerations throughout the impact assessment (“IA”) process, which calls for an assessment of “adverse effects” more generally.³ Additionally, the IA procedure has been modified and is now organized into the following five-phase approach:

- (1) Planning;
- (2) Impact Statement;
- (3) Impact Assessment;
- (4) Decision-making; and
- (5) Post Decision.

The federal Minister of Environment and Climate Change (the “federal Minister”) remains the authority that governs the *IAA*, and providing opportunities for public participation remains fundamental to the federal assessment process.⁴ The procedures, considerations, and timelines for each phase of the IA process are outlined below, with special attention drawn to opportunities for public engagement.

All documents that are subject to public comment are posted publicly to the Impact Assessment Registry, which can be accessed through the following link: <https://IAAc-aeic.gc.ca/050/evaluations>.

Phase One: Planning

When is a project subject to an Impact Assessment?

Typically, only those projects listed in the *Physical Activities Regulations* are subject to an IA,⁵ but the federal Minister does have the ability to subject non-listed projects to the IA process as well.⁶ If the project is subject to an IA, the proponent must provide the Agency with an Initial Project Description.⁷ The description must meet the requirements of the federal *Information and Management of Time Limits Regulations* and must include information about the objectives, benefits, and location of the project as well as information about the local communities and Indigenous groups that may be affected.⁸ When the Initial Project Description is submitted, the Agency may accept it or request more information from the proponent.⁹

Public Participation Opportunity: Once the Project Description has been accepted, the Agency has 180 days to determine whether an IA should be conducted. If an IA is necessary, the Agency will post the Notice of Commencement on the registry once they make their decision.¹⁰ During this time, the Agency must meaningfully engage with the public in order to provide an opportunity for comments on the Initial Project Description.¹¹ In addition to this public consultation, the Agency must also consult, or offer to consult, with:

- a lifecycle regulator¹² (if the project is regulated by one);¹³
- federal authorities who may have relevant expert information;¹⁴
- provincial, territorial and Indigenous jurisdictions that may have responsibilities in relation to the assessment;¹⁵ and
- Indigenous groups who may be affected by the project.¹⁶

The Agency then creates a Summary of Issues document, which must reflect any issues raised during consultation.¹⁷ In response, the proponent must prepare a Revised Project Description that adequately addresses the concerns outlined by the Summary of Issues.¹⁸ The Agency will then review the revised description before deciding whether an IA is required for the proposed project.¹⁹ In making this decision, the Agency must consider any potential adverse impacts within federal jurisdiction, any comments received during consultation, any potential impact on Indigenous rights, and anything else the Agency considers relevant.²⁰

Phase Two: Impact Statement

After determining that a federal IA is necessary, what are the next steps?

Along with the Notice of Commencement, the Agency will also post a Public Participation Plan and Tailored Impact Statement Guidelines (“Guidelines”) on the registry at the end of the Planning Phase.²¹ The Guidelines serve as the terms of reference for the proponent’s Impact Statement. In this way, the Guidelines set out any studies that must be conducted by the proponent, the relevant considerations that must be included for the subsequent assessment, and any other information necessary.²² Once these documents are posted, the proponent has 3 years to develop and submit their Impact Statement to the Agency in accordance with the Guidelines before it is assessed in Phase Three.²³

Public Participation Opportunity: In addition to the opportunities set out in the project-specific Public Participation Plan, a draft of the Guidelines will be posted to the Registry for public comment.²⁴ In this way, the public not only has an opportunity to participate during the proponent’s development of the Impact Statement but the public may also influence the scope of its considerations.

Phase Three: Impact Assessment

Who conducts the Impact Assessment?

Once the Notice of Commencement is posted on the registry, the Minister has 45 days to determine if it is in the public interest to have the project referred to a Review Panel, otherwise the assessment is conducted by the Agency.²⁵ In making that decision, the Minister must consider multiple factors, including public concerns related to the adverse effects of the project.

Agency Assessment

The Agency reviews the proponent’s Impact Statement (“IS”) to ensure that it complies with the Guidelines, considering the scope of the information provided and its sufficiency in addressing concerns. If necessary, the Agency may send the IS back for additional information.²⁶ Once the IS is complete, the Agency has 300 days to prepare an Impact Assessment Report (“IAR”), which outlines the likely adverse effects of the proposed project, the significance of those effects, and any public comments received.²⁷ The finalized IRA acts as the Agency’s recommendation to the federal Minister and informs the Minister’s decision as to whether the proposed project is in the public interest and should be approved or whether the

decision should be referred to the Governor in Council (“GIC”).²⁸

Public Participation Opportunity: The Agency must ensure that the public is provided opportunity to meaningfully participate during the Agency assessment.²⁹ Specifically, a draft IRA is posted to the registry and is subject to public comments, which must be considered before the Agency finalizes the report.³⁰

Review Panel Assessment (“RPA”)

Within 45 days of determining that an RPA is necessary, the federal Minister establishes the terms of reference for the Review Panel, and the Agency must appoint members to the panel that are unbiased and possess relevant expertise.³¹ The Agency remains responsible for reviewing the IS to ensure compliance with the concerns outlined in the Guidelines, but the Panel will review the IS for sufficiency in addressing those concerns. Following any necessary amendments, the Panel will hold public hearings to obtain all information necessary for an accurate assessment of the adverse effects of the project.³² The Panel has a maximum of 600 days to provide the Agency with their findings.³³ Those findings act as the basis for the Agency’s recommendations to the federal Minister before the Minister refers the matter to the GIC to determine if the project is in the public interest and should be approved.³⁴

Public Participation Opportunity: The RPA must hold public hearings. The Panel determines the hearing procedures, including summoning witnesses and ordering witnesses to present evidence and produce relevant records.³⁵ Interested parties may present evidence, concerns, and comments regarding the project’s potential adverse effects, all of which must be reflected in the Review Panel’s final report.³⁶

Do the processes vary if the project is regulated by a lifecycle regulator?

If the project’s activities fall under the authority of a lifecycle regulator, the IA must be completed by an Integrated Review Panel (“IRP”).³⁷ Generally, the IRP assessment follows the same procedures and considerations as an RPA, but the IRP’s terms of reference must be developed by the federal Minister in consultation with the respective regulatory authority.³⁸ Additionally, the appropriate lifecycle regulator must be represented by at least one member on the review panel, but such representation cannot form a majority.³⁹

Phase Four: Decision-Making

Who makes the final decision regarding the project's approval, and what are the considerations?

The federal Minister or the GIC will make the final determination as to whether a proposed project's anticipated adverse effects are in the public interest.⁴⁰ In making this determination, the Minister or GIC must take the Impact Assessment Report into account as well as specific public interest factors, including:

- the extent to which the project contributes to sustainability;
- the significance of the adverse effects,
- the mitigation measures;
- the impact the project may have on the rights of Indigenous peoples; and
- the extent to which the project hinders or contributes to Canada's ability to meet environmental obligations and commitments to mitigating climate change.⁴¹

If the Minister or the GIC is of the opinion that the project is in the public interest despite its adverse effects, the project may move forward, but it may be subject to follow-up programs and conditions mitigating adverse effects.⁴²

Phase Five: Post Decision

How are the follow-up programs or mitigation measures monitored for compliance?

The federal Minister must post a Decision Statement on the registry within 30 days if the Minister made the final determination, and within 90 days if the decision was referred to the GIC.⁴³ The Decision Statement is the document that outlines necessary mitigation measures, follow-up programs, and detailed reasons justifying the final decision and its corresponding conditions.⁴⁴

Generally, the Agency is responsible for monitoring the proponent's compliance with the approval's conditions, and the Agency issues compliance reports regularly;⁴⁵ however, if the project is under the authority of a lifecycle regulator, that regulator takes on this monitoring role.⁴⁶ In cases where the Agency discovers non-compliance, enforcement officers and analysts will work with the proponent to help bring the activity back to conformity with the Decision Statement and the rest of the IAA.⁴⁷ During the process of reviewing non-compliance, the Agency will continue to post relevant information on the registry, including any reports prepared by the

officers or analysts, any notice of non-compliance, and any written orders issued.⁴⁸

Can the approval conditions be updated or amended?

The federal Minister may amend any conditions attached to the Decision Statement but cannot change the substantive outcome of their decision.⁴⁹ Furthermore, such amendments to the Decision Statement are only permitted if the federal Minister is of the opinion that making them will not increase any adverse effects related to the project.⁵⁰ If the project is under the authority of the *Canada Nuclear Safety Commission*, then the Minister cannot amend the approval conditions.⁵¹

Public Participation Opportunity: If the Minister intends to amend the Decision Statement, a notice that reflects the intended amendments will be posted on the registry and will be subject to public comment before the amended Decision Statement is finalized.⁵²

Federal Process under IAA



Newfoundland and Labrador Environmental Assessment Process

When is a project subject to provincial environmental assessment?

Environmental assessment ("EA") in Newfoundland and Labrador is governed by the *Environmental Protection Act* ("EPA") and its corresponding *Environmental Assessment Regulations* (the "Regulations"). A project is considered an "undertaking", and is therefore subject to an EA process under the EPA, if it is designated (listed) in Part III of the Regulations.⁵³

Some of these project types include:⁵⁴

- Waste management;
- Petroleum and coal productions;
- Oil and gas extraction;
- Mining;
- Forestry;
- Aquaculture;
- Food and beverage manufacturing; and,
- Public Facilities.

The Regulations provide descriptions and details about each type of project. Some types of projects may require an EA only if they meet certain criteria, as set out in the Regulations. Often, these criteria are related to the location of the proposed project or its size.

The Minister of Municipal Affairs and Environment (the "provincial Minister") also has the ability to designate a proposed project that is not captured under the Regulation, and, by doing so, to require that project to undergo an EA. The Minister can do this if they are of the opinion that the project will cause significant environmental effects.⁵⁵

When a proposed project is an undertaking according to the Regulations, the project proponent must register the project by submitting a Registration Document to the Department. No undertaking is allowed to proceed unless it has been exempted or released under the EPA.⁵⁶

After a project is registered for an EA, what are the next steps?

The information provided within the Registration Document is initially left to the proponent, but it typically includes:

- a description of the project;

- summaries of potential bio-physical and socio-economic effects; and
- a plan to implement mitigation measures.

Registration Documents can vary, even when proposed projects are similar. The Minister has the discretion to determine the scope of the information to be included in the Registration Document. The Minister may also determine that the Registration Document has insufficient details or information and may require additional information from the proponent.⁵⁷ The Minister has 7 days to request additional information from the proponent after a Registration Document has been filed.

The Registration Document is announced and made available to the public for comment within 7 days of registration. Members of the public may comment on the final Registration Document, in writing, within 35 days of its release and notice from the Minister. The final Registration Document is also reviewed by interested government departments.⁵⁸

After the window for commentary has closed, the EA division of the provincial Department of Municipal Affairs and Environment reviews and considers any public submissions made with respect to the Registration Document, along with comments made by other government departments. The EA division then provides the Minister with a recommendation.

Within 60 days of the undertaking being registered,⁵⁹ the Minister may determine that the undertaking is contrary to law or policy and must notify the proponent of this determination.⁶⁰ If the Minister does so, he or she must refer the matter to the Lieutenant-Governor in Council to decide whether or not the undertaking may proceed.⁶¹

If the Minister does not find that the undertaking is contrary to law or policy, then he or she has 45 days following the registration to make one of the following three decisions.

Option #1: The undertaking is released and the project may proceed

The Minister may decide that the undertaking requires no further assessment under the EPA. The Minister may make this decision if there are no environmental or public concerns about the project or if the environmental effects will be mitigated under another provincial or federal law.⁶²

When deciding whether to release an undertaking, the Minister may consider factors set out in the Regulations, including:⁶³

- the comprehensiveness of the undertaking's description;
- whether or not the undertaking will be in an environmentally or otherwise sensitive area;
- the technology being used; and
- the undertaking's compatibility with other resources in the area.

If an undertaking is released, the proposed project is free to move towards development, subject to authorizations, permits, or licences required by other provincial or federal laws or municipal by-laws.

Option #2: An Environmental Preview Report is required

If the Minister determines that there is insufficient detail to determine the significance of the environmental effects of an undertaking, the Minister will require the proponent to complete an Environmental Preview Report ("EPR").⁶⁴

An EPR supplements the Registration Document by relying on readily available information (usually scientific information and data that are available within existing studies) in order to clarify or address specific concerns that were identified with respect to the Registration Document.

Option #3: An Environmental Impact Statement is required

If the Minister determines that there will be significant negative environmental effects stemming from an undertaking, or if there is significant public concern about the undertaking, the Minister will require an Environmental Impact Statement ("EIS").⁶⁵

An EIS is the most comprehensive environmental review available under the *EPA*. It covers the environmental effects of the entire project, and the process often requires original research and testing rather than reliance on existing information. The Minister may order an EIS following review of the Registration Document or a completed EPR, and the proponent may elect to proceed directly with an EIS at any time. If an EIS is required, the undertaking cannot be approved without conditions.

The Minister may consider a number of factors in determining that an undertaking will have significant negative environmental effects, including:⁶⁶

- the sufficiency of environmental baseline data in predicting environmental effects;

- whether the undertaking would be located in an environmentally sensitive area;
- environmental effects on rare or endangered species;
- whether toxic substances are intended to be used with unknown or experimental technology; and
- the economic importance of a resource to which the undertaking relates.

In determining that an undertaking has produced significant public concern, the Minister may consider whether or not the public's acceptance of the undertaking is seriously in question and whether there is government policy that can address public concerns.⁶⁷

What is the process for an Environmental Preview Report ("EPR")?

If the Minister requires an EPR, the proponent is notified and the Minister appoints an Assessment Committee.⁶⁸ The Assessment Committee is chaired by a member of the EA division of the Department of Municipal Affairs and Environment and includes technical experts from other provincial and federal departments.⁶⁹

The Assessment Committee is responsible for preparing Guidelines (which serve as the terms of reference), reviewing any required reports or studies that are carried out by the proponent, reviewing the EPR report and any component studies, submitting comments, recommendations, and advice to the Minister, and attending meetings related to these matters.⁷⁰ The Guidelines set out the minimum components about which the proponent must submit more information.

If it is determined that an EPR is required, the proponent must be provided with Guidelines within 60 days of that determination.⁷¹ The proponent then carries out its work and submits the EPR to the Minister.⁷² The Minister then gives the EPR to the Assessment Committee, which assesses it and recommends either that the EPR has not complied with the Guidelines, that an EIS is required, or that the undertaking should be released.⁷³

What is the process for an Environmental Impact Statement ("EIS")?

As with an EPR, if an EIS is required, the proponent is notified, the Minister appoints an Assessment Committee, and Guidelines are created to set out the minimum components about which the proponent must submit more information.⁷⁴ While there are no requirements for

the guidelines developed for EPRs, the Regulations set out minimum requirements for the guidelines developed for EIS. Those minimum requirements state, among other things, that the EIS must:

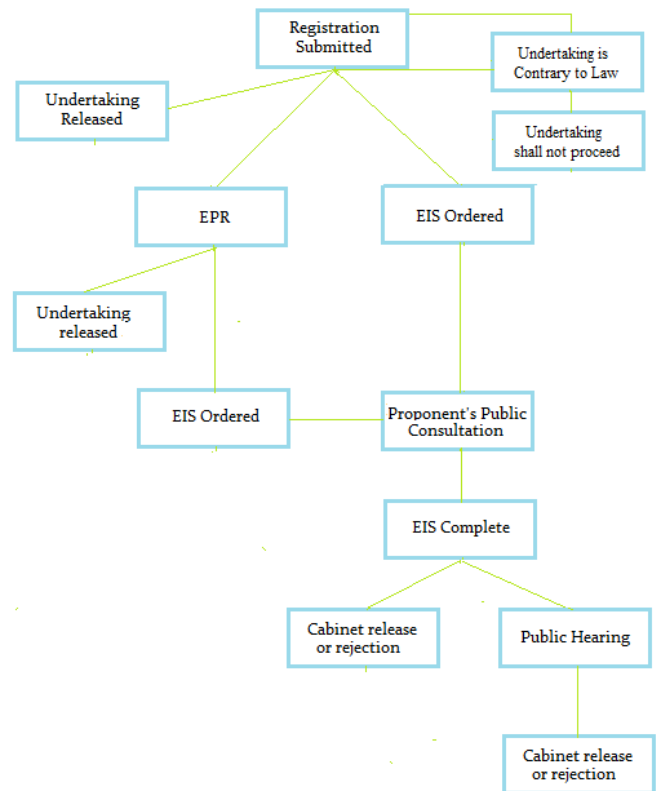
- describe significant environmental effects (beneficial and harmful) likely to be caused;
- list and cite all sources of information;
- outline the design of studies necessary to provide additional information; and
- provide specific responses to concerns and specific proposals to address them, where appropriate.⁷⁵

Once a proponent has submitted its EIS, the Minister has 70 days to determine whether or not the EIS satisfies the requirements of the Guidelines.⁷⁶ If it does not, the Minister may require the proponent to conduct further work, amend the EIS, or submit another report.⁷⁷

During the EIS process, there are several additional steps that a proponent may be required to undergo in order to satisfy the Guidelines. Those steps may include a component study, public hearings, or a review panel.⁷⁸ A component study may be required to study specific components of the environment or effects of the undertaking.⁷⁹ If there is serious public concern, a public hearing or series of hearings may take place to examine the extent of the EIS and provide for the exchange of information between the public and the proponent.⁸⁰ In that case, a board is appointed by the Lieutenant-Governor in Council to carry out a public hearing within the geographic location of the undertaking.⁸¹

The Minister has the power to send the EIS back for various revisions, but releasing the undertaking requires Cabinet approval.⁸²

Provincial EA Process



Public Participation in Provincial Environmental Assessments

How do I find out when an EA has begun?

The Minister provides notice of each stage of an environmental assessment process through the [online Environmental Assessment Bulletin](#).

Bulletins and project information can be found on the website of the Department of Municipal Affairs and Environment. This is where the Minister will announce a project's registration within 7 days of receiving the registration documents. Interested individuals may also ask to be added to the Department's email distribution list.

Registration

After a proponent's Registration Document has been made public, any person may submit written comments to the Minister. Those submissions must be made no later than 35 days after the registration announcement.⁸³ These comments will be considered by the Minister in deciding whether

the undertaking will be released or if an EPR or EIS is required.

Environmental Preview Reports

If the Minister finds that an EPR is required, the Assessment Committee's Guidelines may order the proponent to meet with the public to discuss the undertaking and its environmental effects.⁸⁴ If this is ordered, the proponent must provide 7 days' notice to both the public and the Minister before conducting the consultation.⁸⁵

Once the Minister has notified the public that the proponent has submitted its EPR, a 35-day window for public commentary on the EPR will open.⁸⁶ The Assessment Committee will review the public's responses and consider them as a factor in creating its recommendation to the Minister. The Minister makes the final decision determining whether the EPR is deficient, if an EIS is required, or if the undertaking may be released based on the recommendations.⁸⁷

Environmental Impact Statement

Opportunity #1: Comments on EIS Guidelines

If an EIS is required, there is a 40-day period for the public to submit written comments on the Assessment Committee's Guidelines.⁸⁸ These comments may influence the Minister to send the Guidelines back for revision.⁸⁹

Opportunity #2: Meeting with Proponent

Once EIS Guidelines are approved and the proponent begins to prepare its EIS, the proponent must provide an opportunity for interested members of the public to meet with the proponent in the geographical area of the undertaking or an area that is adjacent to that area.⁹⁰ During this meeting, the proponent provides information about the undertaking and records and responds to concerns of the local community regarding environmental effects of the undertaking. The meeting is subject to a 7-day notice requirement.⁹¹

Opportunity #3: Component Studies

Occasionally, the Minister may require the proponent to prepare and submit a component study as part of the EIS. This study will describe and provide data on specific aspects of the environment as required by the Guidelines.⁹² Once the Minister has received the component study, the Minister must, within 7 days, notify the public that the component study has been received, and members of the public will then have 35 days to provide written comments on the study.⁹³

Opportunity #4: Public Comment Period on EIS

Once the Minister notifies the public that the EIS has been received, a 50-day window for public commentary on the EIS will open.⁹⁴ After that window closes, the Minister provides the EIS and the public's responses to the Assessment Committee for review.⁹⁵

Opportunity #5: Public Hearing

Before making a final decision on the undertaking, the Minister may also recommend to the Cabinet, where there is strong public interest, that public hearings should be ordered.⁹⁶

Under these circumstances, the public hearings are conducted by a board that will include two to five public servants, with at least a third of the board representing the geographical area of the undertaking.⁹⁷ Notice will be posted when the board is appointed, and it will include the date of the hearing and the deadline to submit applications to appear in front of the board.⁹⁸

During the public hearing, the board will record comments and questions posed by members of the public that are participating, as well as answers provided by the proponent where they are possible. If the proponent is unable to provide an answer to a question posed, the proponent must provide an answer in writing within 30 days of the hearing's closing.⁹⁹

The board will submit a report that contains the proceedings of the hearing, recommendations made at the hearing, and the board's own recommendations.¹⁰⁰ This report will be considered by the Cabinet when the Cabinet makes its final decision on the undertaking.¹⁰¹

Overarching Questions

Does a federal or provincial process apply?

For both jurisdictions, the statute and regulations set out a list of designated activities or undertakings that will trigger the beginning of the EA process. For the IAA, the list can be found in the *Physical Activities Regulations*.¹⁰² Provincially, Part III of the *Environmental Assessment Regulations* outlines the activities that are classified as undertakings and subject to the process, and it also identifies activities that are exempt.¹⁰³ These lists are your primary resources for determining whether or not an EA will apply to a project and for which jurisdiction.

Physical Activities Regulations:
[www.gazette.gc.ca/rp-pr/p2/2019-08-21/html/sor-dors285-eng.html](http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html)

Environmental Assessment Regulations:
www.assembly.nl.ca/Legislation/sr/Regulations/rc030054.htm

Federal EA in Newfoundland and Labrador

There are currently 11 projects in Newfoundland and Labrador that are in the process of being reviewed federally. Generally, these projects are limited to oil and gas exploration and drilling, or mining projects. However, because the EIA for those projects began under the previous CEAA process, they will continue under that regime rather than being subject to the IAA and its processes set out above.

Federal Project Registry: <https://www.ceaa-acee.gc.ca/050/evaluations/exploration?culture=en-CA>

Examples of when the provincial EA applies

Since 2000, Newfoundland and Labrador has reviewed over 1000 projects through its EA process. Examples of current projects being assessed include:

- a mining project;
- agriculture development;
- quarry establishment and expansions;
- cannabis production facilities;
- telecommunication infrastructure;
- biomedical waste facilities; and
- trail development.

List of all projects reviewed after 2000:
www.mae.gov.nl.ca/env_assessment/projects/projects_list.html

How do the federal and provincial processes interact?

The IAA provides guidance for cooperation between jurisdictions. Generally, the Agency, or the federal Minister if the IA is to be conducted through a review panel, must offer to cooperate with any jurisdiction defined within the Act, so long as they have powers or responsibilities related to the designated project.¹⁰⁴ More specifically, if any part of the IA may be conducted within another jurisdiction, the responsible federal authority may delegate that aspect to the appropriate authority.¹⁰⁵

Additionally, the federal Minister of Environment and Climate Change may substitute some, or all,

of the processes under IAA with those of the provincial regime or another appropriate jurisdiction.¹⁰⁶ However, this substitution must be requested by the other jurisdiction, and the public must have an opportunity to comment on the proposed substitution.¹⁰⁷ Comments from the public must be considered by the Minister before approving the substitution.¹⁰⁸ Substitution and delegation do not replace the federal decision-making power; they only alter the process leading to the federal decision. These substitutions may also be subject to additional terms and conditions before the Minister's approval is given.¹⁰⁹ IAs overseen by a review panel or a lifecycle regulator cannot be substituted.¹¹⁰

Are there funding programs for participation in the EA process?

The federal Agency administers a Participant Funding Program to provide financial assistance to individuals, not-for-profits, and Indigenous groups in order to prepare them for participation at certain stages in the IA process.¹¹¹ This is only applicable to reviews conducted by the Agency or a federal review panel and does not include substituted projects.¹¹²

In order to qualify for funding, you must show that your contribution will add value to the IA process, and you must meet at least one of the following criteria:

- have a direct, local interest in the project or engagement initiative, such as living or owning property in the project area;
- have community knowledge or Indigenous traditional knowledge relevant to the IA or engagement initiative;
- plan to provide expert information relevant to the anticipated effects of the project or engagement initiative; or
- have an interest in the potential impacts of the project on treaty lands, settlement lands, or traditional territories and/or related claims and rights.

For more information on how to apply, visit:
www.canada.ca/en/impact-assessment-agency/services/public-participation/participant-funding-application-environmental-assessment.html.

Can I challenge the decision made as a result of an IA or EA?

It is very difficult to challenge the results of an IA or EA. There is no legislated right to appeal the decision at the federal level. Therefore, the only option is to start a judicial review proceeding in Canada's Federal Court.

Provincially, the *EPA* allows for an appeal within 60 days of the Minister's decision. This appeal is to be submitted to the Minister, and the Minister must respond within 30 days.¹¹³ If the appeal is unsuccessful, judicial review is necessary to challenge the Minister's decision on appeal. In such cases, the judicial review proceeding will take place in the Supreme Court of Newfoundland and Labrador.

Judicial review is the term used to describe a court's examination of the conduct or decision of a decision-maker such as a board, committee, or Minister to ensure that the conduct or decision was proper in law. Judicial review can only be sought by someone who has "standing",¹¹⁴ which can require different kinds of connection to the issue in different circumstances.

If you wish to consider a judicial review proceeding, you should consult a lawyer who can explain the process in more detail and provide appropriate guidance.

Do the processes meet the Crown's duty to consult?

The Government of Canada and the Government of Newfoundland and Labrador each have a duty to consult Indigenous peoples before engaging in activities that could threaten constitutionally protected Aboriginal or treaty rights.

Canada's courts have set out requirements for the duty to consult in a number of judicial decisions. The duty is defined by the common law (the law established through judicial decision-making) rather than by government statute or regulation.

Under Canada's constitutional common law, the duty to consult is triggered when the federal government or a provincial or territorial government knows about an Aboriginal claim or right and is considering some kind of action that could affect that Aboriginal claim or right negatively. The issuance of IA or EA approvals is government action that triggers the duty to consult.

Section 35 of Canada's *Constitution Act, 1982* protects Aboriginal and treaty rights that are held by Indigenous peoples in Canada. The Crown's duty to consult flows from that constitutional protection, which means that it is a constitutional duty that exists over and above any public participation or Indigenous consultation processes established in IA or EA regimes.

Indigenous participation in the provincial EA process will not necessarily meet the duty to consult, as the EA process is designed to assess

proposed projects' impacts on the environment, whereas the duty to consult requires the government to consider proposed projects' impacts on Indigenous rights.

At the federal level, new processes for Indigenous participation and consultation now included in the *IAA* reflect much of the common law on the duty to consult and will likely make it easier for federal departments and agencies to meet their constitutional duties by following the IA process.

The scope of the Crown's duty to consult varies on a case-by-case basis and is informed by the strength of the Aboriginal claim or right at stake as well as the prospect of harm. Ultimately, although consulting with Indigenous peoples using the frameworks or timelines of IA or EA processes may sometimes fulfill the duty to consult, it will not necessarily do so. The scope of the duty is unique in every case, and there is no "one size fits all" approach.

Definitions

Impact Assessment Act, Section 2

Agency: means the Impact Assessment Agency.

Designated Project: means one or more physical activities that are carried out in Canada or on federal lands and are designated by the *Physical Activities Regulations* or designated in an order made by the federal Minister under subsection 9(1) of the *IAA*.

Effects: means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive or negative consequences of these changes.

Environment: means the components of the Earth, and includes

- a) land, water and air, including all layers of the atmosphere;
- b) all organic and inorganic matter and living organisms; and
- c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

Follow-up Program: means a program for verifying the accuracy of the impact assessment of a designated project and determining the effectiveness of any mitigation measures.

Impact Assessment: means an assessment of the effect of a designated project that is conducted in accordance with the *IAA*.

Indigenous Peoples of Canada has the meaning assigned by the definition of *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*.

Proponent: means the person or entity – federal authority, government or body – that proposes the carrying out of, or carries out, a designated project.

Sustainability: means 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.

Environmental Protection Act, Section 2

Adverse Effect: means an effect that impairs or damages the environment and includes an adverse effect to the health of humans.

Environment: includes

1. air, land and water,
2. plant and animal life, including human life,
3. the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community,
4. a building, structure, machine or other device or thing made by humans,
5. a solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or

indirectly from the activities of humans, or a part or a combination of those things listed above and the interrelationship between 2 or more of them.

Environmental Effect: means a change in the present or future environment that would result from an undertaking.

Undertaking: includes an enterprise, activity, project, structure, work or proposal and a modification, abandonment, demolition, decommission, rehabilitation and an extension of them that may, in the opinion of the provincial Minister, have a significant environmental effect.

For more information

Please visit East Coast Environmental Law at www.ecelaw.ca to access other legal resources and our free online Information Library.

To find the full text of the federal and provincial laws detailed in this Summary Series, go to:

[*Impact Assessment Act*](#)

[*Physical Activities Regulations*](#)

[*Information and Management of Time*](#)

[*Limits Regulations*](#)

[*Environment Protection Act*](#)

[*Environmental Assessment Regulations*](#)

Disclaimer

Please note that this volume cannot cover all environmental impact assessment issues or all options available to you, nor should it be interpreted as legal advice. While East Coast Environmental Law works hard to update its materials, some information contained in this Summary Series may become outdated as statutes, regulations, and policies are updated and amended.

East Coast Environmental Law Association

This Summary Series was developed by the East Coast Environmental Law Association, an environmental law charity based in Halifax, Nova Scotia that engages in public-interest environmental law throughout Atlantic Canada.

East Coast Environmental Law responds to community inquiries, carries out legal and policy research, and presents educational resources and opportunities to increase public awareness of environmental laws throughout Atlantic Canada. Our objective is to build capacity in the public and among legal practitioners so that we can work together to ensure that environmental laws are effectively used and strengthened.

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The Environmental Law Summary Series

The Environmental Law Summary Series was one of the first public legal education activities undertaken by East Coast Environmental Law. Each volume of the Summary Series serves as a quick reference resource. The volumes are topical and generally address an area of interest or concern raised by communities or organizations.

Following is a list of East Coast Environmental Law's summary series documents:

- Volume 1 (2007), Overview of Environmental Legislation (Nova Scotia)
- Volume 2 (2008), Enforcing Environmental Laws (Nova Scotia)
- Volume 3 (2009), Bringing a Private Prosecution
- Volume 4 (2010), Who Owns the Coast (Nova Scotia) [updated, see Volume 10]
- Volume 5 (2010), Environmental Law for Land and Sea (Prince Edward Island)
- Volume 6 (2010), Environmental Law for Land and Sea (New Brunswick)
- Volume 7 (2011), Environmental Assessment Legal Toolkit (Prince Edward Island)
- Volume 8 (2011), Environmental Assessment: A Legal Toolkit for Nova Scotians
- Volume 9 (2018), The PEI Water Act (Prince Edward Island)
- Volume 10 (2018), Who Owns the Coast (Nova Scotia)



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References

- ¹ *Canadian Environmental Assessment Act*, SC 2019, c 28 at s 52(4).
- ² *Impact Assessment Act*, SC 2019, c 28 at s 6(1)(b) [“IAA”].
- ³ IAA, *supra* note 2 at ss 22(1), 36(2), 63.
- ⁴ *Ibid*, Preamble, s 6(1)(h).
- ⁵ *Physical Activity Regulations*, SOR/2019-285; IAA, *supra* note 2 at s 2, “Designated Project”.
- ⁶ IAA, *supra* note 2 at s 9(1).
- ⁷ *Ibid* at s 10.
- ⁸ *Information and Management of Time Limits Regulations*, SOR/2019-283.
- ⁹ IAA, *supra* note 2 at s 15(1).
- ¹⁰ *Ibid* at s 18(1).
- ¹¹ *Ibid* at s 11.
- ¹² The lifecycle regulators (formerly known as “Responsible Authorities”) are now the (1) Canadian Nuclear Safety Commission, (2) Canada Energy Regulator (formerly the National Energy Board or “NEB”), (3) Canada-Newfoundland and Labrador Offshore Petroleum Board and (4) Canada-Nova Scotia Offshore Petroleum Board.
- ¹³ *Ibid* at s 13(2).
- ¹⁴ *Ibid* at s 13(1).
- ¹⁵ *Ibid* at s 12.
- ¹⁶ *Ibid*.
- ¹⁷ *Ibid* at s 14(1).
- ¹⁸ *Ibid* at s 15(1).
- ¹⁹ *Ibid* at s 16(1).
- ²⁰ *Ibid* at s 16(2).
- ²¹ *Ibid* at s 18(1)(b).
- ²² *Ibid* at s 18(1)(a).
- ²³ *Ibid* at s 19(1).
- ²⁴ *Ibid* at s 18(2).
- ²⁵ *Ibid* at s 36(1).
- ²⁶ *Ibid*, s 19(3).
- ²⁷ *Ibid* at ss 28(2), (3), (3.1), (3.2).
- ²⁸ *Ibid* at ss 60(1).
- ²⁹ *Ibid* at s 27.
- ³⁰ *Ibid* at s 28(1).
- ³¹ *Ibid* at s 41(1).
- ³² *Ibid* at s 51(1)(c).
- ³³ *Ibid* at s 37(2).
- ³⁴ *Ibid* at ss 51(1)(d), 55.1(1).
- ³⁵ *Ibid* at ss 53 (1), (2).
- ³⁶ *Ibid* at s 51(1)(d).
- ³⁷ *Ibid* at s 43.
- ³⁸ *Ibid* at ss 44(1), 47(1).
- ³⁹ *Ibid* at ss 44(3)-(4), 47(3)-(4).
- ⁴⁰ *Ibid* at ss 60, 62.
- ⁴¹ *Ibid* at s 63.
- ⁴² *Ibid* at ss 60, 62.
- ⁴³ *Ibid* at ss 65(1)-(4), 66.
- ⁴⁴ *Ibid* at s 65(1)(b), (2).
- ⁴⁵ *Ibid* at ss 105(2), 156(2)(e); Government of Canada, *Impact Assessment Process Overview*, “Phase 5” (8 November 2017), online: <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview/phase5.html>> [“IA Overview”].
- ⁴⁶ IA Overview, *supra* note 45.
- ⁴⁷ *Ibid*.
- ⁴⁸ *Ibid*.
- ⁴⁹ IAA, *supra* note 2 at s 68(1).
- ⁵⁰ *Ibid* at s 68 (2).
- ⁵¹ *Ibid* at s 68(4).
- ⁵² *Ibid* at ss 69(1)-(2).
- ⁵³ *Environmental Assessment Regulations*, NL Reg 54/03, Part III [“NL Regulations”].
- ⁵⁴ *Environmental Protection Act*, RSNL 2002, c E-14.2 at s 49 [“EPA”].
- ⁵⁵ *Ibid* at s 2(mm).
- ⁵⁶ *Ibid* at s 48.
- ⁵⁷ *Ibid* at s 49.
- ⁵⁸ NL Regulations, *supra* note 53 at s 3(2).
- ⁵⁹ *Ibid* at s 4(2).
- ⁶⁰ EPA, *supra* note 54 at s 50(1).
- ⁶¹ *Ibid* at s 50(2).

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- ⁶² NL Regulations, *supra* note 53 at s 23.
- ⁶³ *Ibid* at s 23(1).
- ⁶⁴ *Ibid* at s 24(1).
- ⁶⁵ *Ibid* at s 25(1).
- ⁶⁶ *Ibid* at s 25(2).
- ⁶⁷ *Ibid* at s 25(2).
- ⁶⁸ *Ibid* at s 4(1); EPA, *supra* note 54 at s 52(1).
- ⁶⁹ EPA, *supra* note 54 at s 52.
- ⁷⁰ NL Regulations, *supra* note 53 at s 5(4).
- ⁷¹ *Ibid* at s 5(7).
- ⁷² EPA, *supra* note 54 at s 54(2).
- ⁷³ *Ibid* at ss 54(3)-(5).
- ⁷⁴ NL Regulations, *supra* note 53 at s 5(7).
- ⁷⁵ *Ibid* at s 8.
- ⁷⁶ *Ibid* at s 11(7).
- ⁷⁷ EPA, *supra* note 54 at ss 60, 61.
- ⁷⁸ *Ibid* at s 63; NL Regulations, *supra* note 53 at ss 12(1), 13(1).
- ⁷⁹ NL Regulations, *supra* note 53 at s 12.
- ⁸⁰ EPA, *supra* note 54 at s 63(1).
- ⁸¹ *Ibid* at s 63.
- ⁸² EPA, *supra* note 54 at s 67(2).
- ⁸³ NL Regulations, *supra* note 53 at s 3(3).
- ⁸⁴ *Ibid* at s 10(2).
- ⁸⁵ *Ibid*.
- ⁸⁶ *Ibid* at s 7(3).
- ⁸⁷ EPA, *supra* note 54 at s 54(5).
- ⁸⁸ *Ibid* at s 6(1).
- ⁸⁹ *Ibid* at ss 6(2), 6(3).
- ⁹⁰ EPA, *supra* note 54 at s 58.
- ⁹¹ NL Regulations, *supra* note 53 at s 10(1).
- ⁹² *Ibid* at s 12(1).
- ⁹³ *Ibid* at s 12(4).
- ⁹⁴ *Ibid* at s 11(3).
- ⁹⁵ *Ibid* at s 11(1)(4).
- ⁹⁶ EPA, *supra* note 54 at s 63(1).
- ⁹⁷ *Ibid* at s 63.
- ⁹⁸ NL Regulations, *supra* note 53 at s 13(4).
- ⁹⁹ *Ibid* at s 14(4).
- ¹⁰⁰ EPA, *supra* note 54 at s 65.
- ¹⁰¹ *Ibid* at s 67(2).
- ¹⁰² *Physical Activities Regulations* (SOR/2019-285)
- ¹⁰³ NL Regulations, *supra* note 53.
- ¹⁰⁴ IAA, *supra* note 2 at s 21.
- ¹⁰⁵ *Ibid* at s 29.
- ¹⁰⁶ *Ibid* at s 31(1).
- ¹⁰⁷ *Ibid*.
- ¹⁰⁸ *Ibid* at ss 31(1)-(3).
- ¹⁰⁹ *Ibid* at ss 33,34.
- ¹¹⁰ *Ibid* at ss 32(a)-(b). Additionally, the Minister cannot approve the substitution of a process if the activities are regulated under the *Canada Oil and Gas Operations Act*, the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, or the *Canada Transportation Act*.
- ¹¹¹ *Ibid* at s 75.
- ¹¹² *Ibid* at s 75(2).
- ¹¹³ EPA, *supra* note 54 at s 107.
- ¹¹⁴ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 36.