

Environmental Impact Assessment: A Legal Toolkit for Prince Edward Island

This volume of the East Coast Environmental Law Summary Series provides an overview of the federal and provincial environmental impact assessment processes for Prince Edward Island. 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.ecelaw.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 socio-economic 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 PEI *Environmental Protection Act* (“EPA”) and the Minister of Environment, Water, and Climate Change govern the EIA process. It should be noted, however, that the PEI EIA regime differs from those of other jurisdictions, as the majority of the procedures, timelines, and

considerations required for the EIA are set out in the PEI *Environmental Impact Assessment Guidelines* (the “Guidelines”) rather than being outlined within the EPA or its regulations. This is an important distinction because, unlike legislation or regulations, the Minister is not bound by the Guidelines, and so the Minister’s determinations throughout the EIA process cannot be challenged for not conforming with the Guidelines. Although not binding, the Guidelines do outline what is typically required by the Minister for the provincial EIA process.¹

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 lists matters about which the provinces may exclusively make laws. 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 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”,² the *IAA*’s scope is broader than just environmental considerations and requires an assessment of both cultural and social impacts as well.³ 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 addressed throughout the impact assessment (“IA”) process, which calls for an assessment of “adverse effects” more generally.⁴ 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.⁵ 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,⁶ but the federal Minister does have the ability to subject non-listed projects to the IA process as well.⁷ If the project is subject to an IA, the proponent must provide the Agency with an Initial Project Description.⁸ 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.⁹ When the Initial Project Description is submitted, the Agency may accept it or request more information from the proponent.¹⁰

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.¹¹ During this time, the Agency must meaningfully engage with the public in order to provide an opportunity for comments on the Initial Project Description.¹² In addition to this public consultation, the Agency must also consult, or offer to consult with:

- a lifecycle regulator¹³ (if the project is regulated by one);¹⁴
- federal authorities who may have relevant expert information;¹⁵
- provincial, territorial and Indigenous jurisdictions that may have responsibilities in relation to the assessment;¹⁶ and
- Indigenous groups who may be affected by the project.¹⁷

The Agency then creates a Summary of Issues document, which must reflect any issues raised during consultation.¹⁸ In response, the proponent

must prepare a Revised Project Description that adequately addresses the concerns outlined by the Summary of Issues.¹⁹ The Agency will then review the revised description before deciding whether an IA is required for the proposed project.²⁰ 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.²¹

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.²² 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.²³ 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.²⁴

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.²⁵ 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 the Impact Statement's 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.²⁶ 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.²⁷ 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.²⁸ The finalized IAR 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").²⁹

Public Participation Opportunity: The Agency must ensure that the public is provided opportunity to meaningfully participate during the Agency assessment.³⁰ Specifically, a draft IAR is posted to the registry and is subject to public comments, which must be considered before the Agency finalizes the report.³¹

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.³² 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.³³ The Panel has a maximum of 600 days to provide the Agency with its findings.³⁴ 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.³⁵

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.³⁶ 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.³⁷

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").³⁸ 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.³⁹ Additionally, the appropriate lifecycle regulator must be represented by at least one member on the review panel, but such representation cannot form a majority.⁴⁰

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.⁴¹ 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.⁴²

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.⁴³

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.⁴⁴ 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.⁴⁵

Generally, the Agency is responsible for monitoring the proponent's compliance with the approval's conditions, and the Agency issues compliance reports regularly;⁴⁶ however, if the project is under the authority of a lifecycle regulator, that regulator takes on this monitoring

role.⁴⁷ 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.⁴⁸ 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.⁴⁹

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.⁵⁰ Furthermore, such amendments to the Decision Statement are only permitted if the federal Minister is of the opinion that doing so will not increase any adverse effects related to the project.⁵¹ If the project is under the authority of the *Canada Nuclear Safety Commission*, then the Minister cannot amend the approval conditions.⁵²

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.⁵³

Federal Process under IAA



Prince Edward Island Environmental Assessment Process

What projects are subject to provincial EIA?

Any project that is considered an undertaking under the *EPA* is subject to the provincial EIA process and must receive written approval from the Minister of Environment, Water and Climate Change (the "Minister") before development can proceed.⁵⁴ The PEI *Environmental Impact Assessment Guidelines* (the "Guidelines") provide a list of 53 common undertakings, including:

- manure storage facilities;
- aquaculture facilities;
- sawmills;
- mines;
- golf courses; and
- compost operations.⁵⁵

The list, however, is not intended to be exhaustive. The Department of Environment, Water and Climate Change ("the Department") may determine that a non-listed project is considered an undertaking and subject it to the EIA process. In making this decision, the Department assesses whether or not the proposed project will produce emissions or have an effect on unique or rare aspects of the environment, in addition to assessing the project's potential to result in significant environmental effects and any corresponding public concerns.⁵⁶ This detailed screening process begins when the project's proponent provides the Department with the initial project description through their Project Information Form.

How is the Project Information Form ("PIF") reviewed?

The PIF provides the Department with preliminary information about the proposed project.⁵⁷ The form must be signed by the proponent and submitted along with an application fee. Once received, the Department will begin the screening process to determine if an EIA is required. This review may be conducted collaboratively with an interdepartmental Technical Review Committee ("TRC"), municipal authorities, special interest groups, or the general public.⁵⁸

If the project is not considered an undertaking, the application fee will be returned to the proponent, and the project will be assessed as a referral project. These projects are still subject to a review, and recommendations concerning

environmental issues may be provided to the proponent. Sometimes during the referral review, a project will be “‘upgraded’ to an undertaking because of environmental concerns that arise during the review”.⁵⁹

If a project is considered an undertaking, the assessment review process will begin with the information that the Department has and any additional information necessary for the assessment to proceed.⁶⁰

What is required once it is determined that an EIA is necessary?

The Department requires the proponent of any undertaking to submit an Environmental Impact Statement (“EIS”) as part of the review process. The proponent is responsible for preparing the EIS and any costs associated with the study. The EIS is meant to predict the anticipated environmental impacts of the proposed project.⁶¹ The Guidelines outline that this information typically includes:

- information about the proponent;
- a detailed project description;
- construction activities associated with the proposed project;
- environmental issues related to the operation of the project: for example, the waste management strategy;
- description of the biological, physical, and human environment;
- potential impacts to the environment;
- measures to mitigate environmental impacts;
- public consultation plans; and
- a conclusion or recommendation by the report writer on whether the project should proceed as described in the report.⁶²

An environmental assessment coordinator (“EA coordinator”) is assigned to act as the liaison between the Department and the proponent.⁶³ The EIS becomes available for public comment and is posted on the Department’s website along with a summary description of the proposed project.

How is the EIS Reviewed?

The EA coordinator refers the EIS to the TRC, whose role is to:

- provide technical expertise, review written proposals, and provide input;
- prepare comments and provide directions for proponents to make additional studies or provide more information when needed; and
- advise the EA coordinator whether environmental impacts and mitigation measures within the EIS are adequately addressed.⁶⁴

The TRC may consist of members of various PEI Departments, Environment and Climate Change Canada, Fisheries and Oceans Canada, and other organizations as required. The EA coordinator will determine how to circulate the EIS report to TRC members based on the specifics of the proposed project and the technical expertise required to evaluate it.⁶⁵

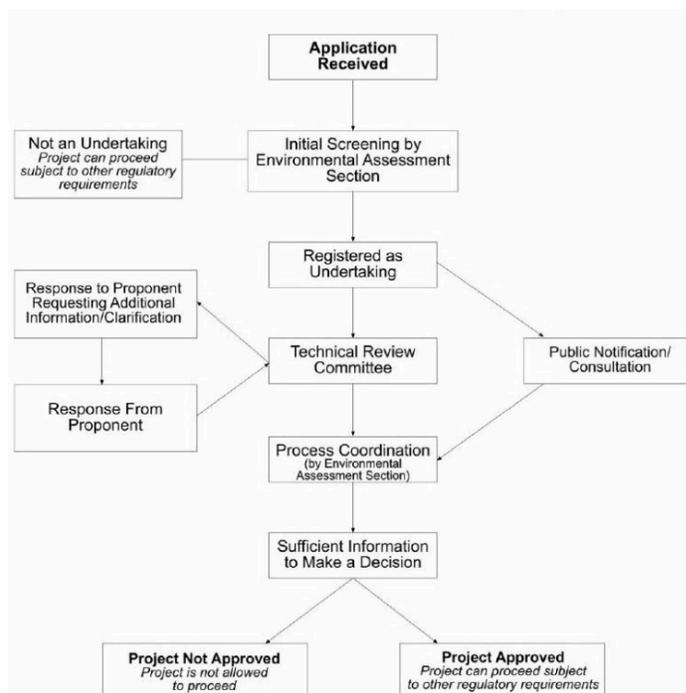
The TRC members take a minimum of three weeks to review the EIS according to their areas of expertise and provide comments to the EA coordinator.⁶⁶ Typical “categories” of comments from TRC members include:

- more information is required;
- some relevant environmental issues are not addressed in the EIS report and should be addressed;
- “conditions should be attached to any approval”;
- “no approval conditions are required”; and
- “[t]he project should not be approved based on the submission”.⁶⁷

After receiving comments from the TRC, the EA coordinator may ask the proponent to provide additional information, evaluate new issues that arose during the review process, or move on to the next step of the EIA process.⁶⁸

Provincial EIA Process

PEI’s [Environmental Impact Assessment Guidelines](#) use the following flowchart to illustrate the EIA process:



Public Participation in Provincial Environmental Assessments

How will I know when a provincial EIA has begun?

Although not required under the *EPA*, the Minister *may* notify the public of any proposed undertaking and provide corresponding opportunities for public engagement.⁶⁹ In addition to the posting at the EIA Department's Charlottetown office, a list of all projects that have been subject to a provincial EIA since 2012 can be found on the EIA Department's online registry.

Are there specific requirements for public engagement during a provincial EIA?

Level I Public Consultation

When the Minister provides opportunities for public engagement, Level I public consultation will typically occur for proposed projects with little to no public concern and "few expected negative environmental impacts".⁷⁰ Under the Guidelines, Level I consultation typically includes:

- a notice posted on the Department website that a proposal has been received, with contact information to submit comments or request additional information; and
- one to six newspaper notices to advise the public that a proposal has been submitted, with contact information to submit comments or request additional information.⁷¹

A project subject to Level I consultation may "be upgraded to Level II if significant concern is generated through the assessment process".⁷²

Level II Public Consultation

Level II public consultation "requires the proponent to hold at least one public information session in the area of the proposed project".⁷³ At the public information session, the proponent must:

- supply written material, including the EIS report for on-site review and project summary handouts;
- provide material on the proposed project, such as maps of the area, conceptual drawings of the project, and an oral or video presentation;
- have people at the meeting who are qualified to answer questions about the project;
- advertise about the meeting for six consecutive days in the *Guardian* and the local

- newspaper (posters, TV, and radio advertisements may also be used); and
- supply public comment forms at the meeting (any forms submitted to the proponent must be forwarded to the Department).⁷⁴

A Department representative will receive comments and address questions about the EIA process at the meeting(s). The public information session must be held at least 14 calendar days after the EIS is submitted. Public consultation details and the EIS report will be posted on the Department website. The public will have "a minimum of 10 calendar days to submit comments on the project" to the Department following the public information session.⁷⁵

The Minister's Decision

The information that the EA coordinator receives regarding the proposed project "is compiled and forms part of the screening document", which is used by the Minister to decide whether to approve or deny the undertaking.⁷⁶ The screening document created by the EA coordinator generally provides the following:

- "background information on the project and proponent";
- "an outline and discussion of associated environmental issues associated with the project";
- "mitigation measures proposed by the proponent";
- "any terms and conditions that should form part of an approval"; and
- "a recommendation regarding approval of the project".⁷⁷

After reviewing the screening document, the Minister may make one of the following decisions:

- more information is required;
- the project is approved;
- the project is approved, subject to terms and conditions; or
- "project approval is denied".⁷⁸

If a project is approved, with or without terms and conditions, the proponent may still need to get additional approvals from other provincial and federal departments. Generally, the screening document and the Minister's final decision take approximately two weeks to prepare following the close of public consultation.⁷⁹

A Note on Timelines

Generally, the provincial EIA process is not subject to rigid timelines. The Guidelines suggest that 8-10 weeks is the typically timeline for the average undertaking, but they also explain that the process varies significantly based on the

complexity of the proposed undertaking.⁸⁰ The only specific timelines set out in the Guidelines for a provincial EIA are the minimum three weeks for the TRC's review of the EIS, the requirements for notice and participation in public consultation, and the estimated two weeks for the development of the screening document and the Minister's final decision.⁸¹

Overarching Questions

Does a federal or provincial process apply?

The federal and provincial regimes both include lists of designated activities or undertakings that should trigger the EIA process. For the *IAA*, the list of designated activities that require federal IAs can be found in the *Physical Activities Regulations*.⁸² Provincially, "Appendix A" of the *Environmental Impact Assessment Guidelines* lists activities that will typically be classified as undertakings and subjected to PEI's EIA process.⁸³ These lists are your primary resources for determining whether or not an EIA will apply to a project and for which jurisdiction.

Physical Activities Regulations:

<http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html>

Environmental Impact Assessment Guidelines:

https://www.princeedwardisland.ca/sites/default/files/publications/environmental_impact_assessment_guidelines.pdf

Federal IA in PEI

There has only been one project in PEI that has been subject to the full federal EIA process, which dates back to the previous regime under *CEAA* 1992. There are, however, several projects that are listed on the registry as they were proposed on federal lands.

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

Examples of when provincial EIA applies

Since 2010, PEI has reviewed 72 projects through its EIA process. Some examples of current projects being assessed include:

- an asphalt plant;
- an aquaculture research facility;
- a wind energy project; and
- a clam processing facility.

List of all projects registered after 2012:

www.princeedwardisland.ca/en/feature/projects-under-environmental-review-undertakings#/home/EnvironmentalImpactAssessments/EnvironmentalImpactAssessments;project_name=;proponent=;location=;year=;sid=;page_num=1;page_count=1;finished=0

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.⁸⁴ 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.⁸⁵

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.⁸⁶ However, this substitution must be requested by the other jurisdiction, and the public must have an opportunity to comment on the proposed substitution.⁸⁷ Comments from the public must be considered by the Minister before approving the substitution.⁸⁸ 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.⁸⁹ IAs overseen by a review panel or a lifecycle regulator cannot be substituted.⁹⁰

Are there funding programs for participation in the 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.⁹¹ This is only applicable to reviews conducted by the Agency or a federal review panel and does not include substituted projects.⁹²

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 EIA?

It is very difficult to challenge the results of an IA or EIA. There is no legislated right to appeal the decision at the federal or provincial level.⁹³ Therefore, the only option for parties other than the proponent to review the EIA decisions is to apply for judicial review.

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",⁹⁴ 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 Prince Edward Island 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 EIA 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 EIA regimes.

Indigenous participation in the provincial EIA process will not necessarily meet the duty to consult, as the EIA 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 EIA 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.

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 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 1

Environment: includes (i) air, land, and water, (ii) plant and animal, including human, life, and any feature, part, component, resource or element thereof.

Undertaking: any construction, industry, operation or other project or any alteration or modification of any existing undertaking which will or may

- cause the emission or discharge of any contaminant into the environment,
- have an effect on any unique, rare or endangered feature of the environment,
- have a significant effect on the environment or necessitate further development which is likely to have a significant effect on the environment, or
- cause public concern because of its real or perceived effect or potential effect on the environment.

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](#)

[PEI Environmental Protection Act](#)

[Environmental Assessment Fees Regulations](#)

[PEI Environmental Impact Assessment Guidelines](#)

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.

Support

Research support was provided by law students Olivier Bishop-Mercier, Michael Boyd, and Ian MacKinnon.

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.

The 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 *Wellington Centre v PEI (Minister of Environmental Resources)*, 148 Nfld & PEIR 41, 1996 CanLII 3731 (PWI SCTD) at para 41.
- ² *Canadian Environmental Assessment Act*, SC 2019, c 28 at s 52(4).
- ³ *Impact Assessment Act*, SC 2019, c 28 at s 6(1)(b) ["IAA"].
- ⁴ *IAA*, *supra* note 3 at ss 22(1), 36(2), 63.
- ⁵ *Ibid* at Preamble and s 6(1)(h).
- ⁶ *Physical Activity Regulations*, SOR/2019-285; and *IAA*, *supra* note 3 at s 2, "Designated Project".
- ⁷ *IAA*, *supra* note 3 at s 9(1).
- ⁸ *Ibid* at s 10.
- ⁹ *Information and Management of Time Limits Regulations*, SOR/2019-283.
- ¹⁰ *IAA*, *supra* note 3 at s 15(1).
- ¹¹ *Ibid* at s. 18(1).
- ¹² *Ibid* at s. 11.
- ¹³ 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.
- ¹⁴ *Ibid* at s 13(2).
- ¹⁵ *Ibid* at s 13(1).
- ¹⁶ *Ibid* at s 12.
- ¹⁷ *Ibid*.
- ¹⁸ *Ibid* at s 14(1).
- ¹⁹ *Ibid* at s 15(1).
- ²⁰ *Ibid* at s 16(1).
- ²¹ *Ibid* at s 16(2).
- ²² *Ibid* at s. 18(1)(b).
- ²³ *Ibid* at s 18(1)(a).
- ²⁴ *Ibid* at s 19(1).
- ²⁵ *Ibid* at s 18(2).
- ²⁶ *Ibid* at s 36(1).
- ²⁷ *Ibid* at s 19 (3).
- ²⁸ *Ibid* at ss 28(2), (3), (3.1), (3.2).
- ²⁹ *Ibid* at ss 60(1).
- ³⁰ *Ibid* at s. 27.
- ³¹ *Ibid* at s 28(1).
- ³² *Ibid* at s 41(1).
- ³³ *Ibid* at s 51(1)(c).
- ³⁴ *Ibid* at s 37(2).
- ³⁵ *Ibid* at ss 51(1)(d), 55.1(1).
- ³⁶ *Ibid* at ss 53 (1), (2).
- ³⁷ *Ibid* at s 51(1)(d).
- ³⁸ *Ibid* at s 43.
- ³⁹ *Ibid* at ss 44(1), 47(1).
- ⁴⁰ *Ibid* at ss 44(3)-(4), 47(3)-(4).
- ⁴¹ *Ibid* at ss 60, 62.
- ⁴² *Ibid* at s 63.
- ⁴³ *Ibid* at ss 60, 62.
- ⁴⁴ *Ibid* at ss 65(1)-(4), 66.
- ⁴⁵ *Ibid* at s 65(1)(b), (2).
- ⁴⁶ *Ibid* at 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"].
- ⁴⁷ IA Overview, *supra* note 46.
- ⁴⁸ *Ibid*.
- ⁴⁹ *Ibid*.
- ⁵⁰ *IAA*, *supra* note 3 at s 68(1).
- ⁵¹ *Ibid* at s 68 (2).
- ⁵² *Ibid* at s 68(4)
- ⁵³ *Ibid* at ss 69(1)-(2).
- ⁵⁴ *Environmental Protection Act*, RSPEI 1988, c E-9 at s 9(1) ["EPA"].
- ⁵⁵ Department of Environment, Water, and Climate Change, *PEI Environmental Impact Assessment Guidelines* (January 2010) Appendix A ["PEI Guidelines"].
- ⁵⁶ EPA, *supra* note 54 at ss 9(1), 1(p).
- ⁵⁷ PEI Guidelines, *supra* note 55 at Appendix D.
- ⁵⁸ *Ibid* at 10.

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- ⁵⁹ *Ibid* at 11.
- ⁶⁰ *Ibid* at 10.
- ⁶¹ EPA, *supra* note 54 at ss 9(2)-(3).
- ⁶² PEI Guidelines, *supra* note 55 at 13-16.
- ⁶³ *Ibid*. The EA coordinator's role is summarized in the *Guidelines* at Appendix E (page 37).
- ⁶⁴ *Ibid* at 17.
- ⁶⁵ *Ibid* at 17-18.
- ⁶⁶ *Ibid* at 22.
- ⁶⁷ *Ibid* at 18.
- ⁶⁸ *Ibid* at 18.
- ⁶⁹ EPA, *supra* note 54 at s 9(2)(c).
- ⁷⁰ PEI Guidelines, *supra* note 55 at 19.
- ⁷¹ *Ibid*.
- ⁷² *Ibid*.
- ⁷³ *Ibid* at 20.
- ⁷⁴ *Ibid*.
- ⁷⁵ *Ibid*.
- ⁷⁶ *Ibid* at 21.
- ⁷⁷ *Ibid*.
- ⁷⁸ *Ibid*.
- ⁷⁹ *Ibid* at 22.
- ⁸⁰ *Ibid*.
- ⁸¹ *Ibid*.
- ⁸² *Physical Activities Regulations* (SOR/2019-285).
- ⁸³ PEI Guidelines, *supra* note 55 at Appendix A.
- ⁸⁴ IAA, *supra* note 3 at s 21.
- ⁸⁵ *Ibid* at s 29.
- ⁸⁶ *Ibid* at s 31(1).
- ⁸⁷ *Ibid*.
- ⁸⁸ *Ibid* at ss 31(1)-(3).
- ⁸⁹ *Ibid* at ss 33,34.
- ⁹⁰ *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*.
- ⁹¹ *Ibid* at s 75.
- ⁹² *Ibid* at s 75(2).
- ⁹³ PEI Guidelines, *supra* note 55 at 21.
- ⁹⁴ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 36.