

# **Pre-planning under the Impact Assessment Act**

Report to the Impact Assessment Agency of Canada

Technical Advisory Committee

May 2022

## **Introduction**

The TAC Subcommittee on Pre-Planning has been asked to consider ways to enhance what happens before the start of the formal process under the 2019 *Impact Assessment Act* (the Act). We call this the Pre-planning Phase. We have met several times, reviewed ideas provided by TAC members at TAC meetings and asked the Agency to provide input by telling us what its current pre-planning practices are. The very helpful results received from the Agency are listed and discussed below.

## **Background and Underlying Principles**

In carrying out any impact assessment, there is a time during which preliminary activities are undertaken with a view to enabling the rest of the impact assessment to be effectively and efficiently completed. Preliminary activities include: (1) the identification of, and engagement with, people who are likely to be involved in the impact assessment process (such as stakeholders, rights holders, Indigenous communities, the public (interest groups and individuals)), Federal Authorities (and Indigenous, provincial, territorial or municipal authorities as appropriate) and the Agency; and (2) carrying out preliminary studies (baseline studies and the like) to get the assessment started.

For most designated projects, the time allocated to the “planning phase” under the Act (180 days) is insufficient to accomplish these activities; accordingly, it is very common for proponents (and others) to start planning before the formal planning phase commences – the pre-planning phase, which is intended to allow more up-front time to enable all parties to exchange information and carry out studies that will make for better later stages of the impact assessment process. Without pre-planning, relations between participants will be awkward or even adversarial; with an effective pre-planning phase, the whole process can become more collaborative between proponents and other participants, and hence more productive. Effective early engagement builds trust among participants in the assessment process. With constructive advice being provided by Federal Authorities (and provincial, territorial, municipal and Indigenous Authorities) to the proponent and its consultants, the impact assessment work carried out will greatly improve and the subsequent tasks of reviewing the impact assessments will be much easier and more efficient for the Agency and the applicable authorities<sup>1</sup>. We present below many of the ways these considerable benefits can be achieved through effective pre-planning<sup>2</sup>. There is considerable value added to the impact assessment process by a pre-planning phase.

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<sup>1</sup> This is especially true for a new Act with new requirements such as positive effects, Health, Social and Economic Impacts needing to be assessed and with GBA+ a requirement.

<sup>2</sup> Should a proponent not wish to be involved in pre-planning, it is not obliged to do so. However, the considerable benefits of doing so should be seriously considered.

## Engagement

There are many guides to good engagement practices. We encourage all involved in impact assessment to use them wisely. Below, we attempt to deal solely with engagement in the pre-planning phase.

We break down the purpose of engagement in the pre-planning phase into four main activities: determination of whom to engage; capacity building; scoping<sup>3</sup> (determining what needs to be assessed in the impact assessment); and discussions regarding project alternatives.

It should also be noted that engagement between a proponent and others at this early stage carries with it some additional responsibilities. Proponents must ensure any financial disclosure obligations are met; the Subcommittee accepts that such an obligation is the responsibility of the proponent and would be fully complied with. A second responsibility arises from the (correct) perception that the Impact Assessment process tends to be more adversarial. Collaborative and respectful engagement will be essential for a good pre-planning process and could set the stage for a more collaborative impact assessment process.

### Whom to Engage

The proponent may have difficulties identifying the peoples to engage with if it does not have prior experience in the area. Assistance from the Agency and others will be helpful. The Agency should have well established networks across the country. Same for Federal (and other) Authorities. Those sources should be used to provide advice regarding Indigenous communities, interest groups, etc. The Agency and other Authorities<sup>4</sup> should try to assist whenever they can because early assistance will almost always make the rest of the impact assessment process much better and thus easier to deal with.

### Capacity Building

Because the *Impact Assessment Act* is relatively new, almost all people involved in assessments are likely to benefit from improved capacity to do so. The most obvious way of increasing capacity in the public and in governments is for the Agency to provide good information about how the generic process works. In addition to the Agency providing information about the *Impact Assessment Act*, building the ability of participants in the impact assessment process to contribute effectively is a more important component of capacity building. These components are described next.

Indigenous communities are often forced to deal with many different issues with very few resources. They may not believe they can afford to engage with proposed projects so early. Several techniques can be used to increase the likelihood of early engagement. As noted above, early information sharing, the provision of resources and capacity building for those interested in participating in the assessment process will be important for all participants in the review process. This is especially true for many Indigenous communities.

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<sup>3</sup> Note that scoping continues through the Planning Phase as well. This would be preliminary scoping.

<sup>4</sup> Provincial or Territorial Authorities can be quite important, as can Municipal, or Indigenous Authorities. In providing information about whom to consult, the Agency should contact them as well.

The Indigenous Advisory Committee (with TAC) recently issued “Recommendations to the Agency on the braiding of Indigenous knowledge and Western science, for the Agency’s advice to proponents regarding the inclusion of Indigenous knowledge in the early planning phase”. It contains several suggestions that would apply to pre-planning with Indigenous peoples. The following three paragraphs are relevant suggestions from those recommendations.

- “Start negotiating an agreement with the community on IK early in the process. This negotiation should take into account the treaties and history of the communities involved. An agreement (it could be a memorandum of understanding (MOU), communication and engagement agreement, collaboration agreement, etc.) between the community and the proponent prior to a specific agreement on IK is recommended. Collaboration agreements should be rooted in, and contribute towards, building a mutual, evolving relationship between the parties that is aimed at moving further on the path of **reconciliation**.
- Include in the agreement all the aspects necessary to ensure a good collaboration during IK studies. Without limitation, these aspects should be covered:
  - (1) Role of the community members in the study
  - (2) Funding: Since the communities are likely to do the IK studies themselves, funding for the community should be offered for their participation (and the eventual hiring of a consultant if needed).
  - (3) Knowledge collection methods and approaches
  - (4) Validation and interpretation approach
  - (5) Use of the IK in the impact statement
  - (6) Confidentiality and intellectual property clauses
  - (7) Dispute resolution clauses
- To ensure a good planning of the IK studies, do joint scoping with the community. The result of this scoping should be a review of the potential issues where Indigenous knowledge is critical. Develop working protocols for these issues, including the community and proponent representatives’ roles, responsibilities and interactions (workshops, regular meetings etc.) Adopt a full and transparent approach, including ongoing communication about the project’s developments during the IA (alternatives, variants, layout etc.)”

Working respectfully with Indigenous communities is an effective way of encouraging good relations with Indigenous Peoples. Examples of how to demonstrate respect may include but are not limited to: using ceremonies prior to undertaking studies, offering training to community members in order that the community can carry out its own studies (with funding), developing Indigenous departments within the proponent’s organisation, employing Indigenous community members to help “get things right”, having a Council of Elders and Youth to advise the proponent, providing capacity support for Indigenous rights assessment, IK and other studies, and having and creating a proponent reconciliation policy. Efforts to engage well with

Indigenous communities and the public may take quite long times (years?); hence an early start is strongly advised. And the early start will very likely need to close the gaps between communities and the proponent so both will be better able to participate in the rest of the IA process. Indeed, we have heard a great deal about the importance and benefits of building good relationships with people who may well become employees, customers and neighbours of the project, should it proceed.

We have heard a lot about the importance of building trust and working toward consensus on the process to be followed once the formal assessment is initiated, and the substance of that assessment (e.g., building a consensus regarding which VCs are most important and on the relevant values that will be used to determine sustainability, thresholds for extent of significance of effects on each VC and project alternatives to be examined). We have heard about the important work the proponent can do to effectively engage with those potentially affected to build this trust and work toward a consensus. However, we have also heard about the need for impartial and independent administration of the pre-planning process and about the need for resources and capacity building. We have heard that a focus on these issues in pre-planning carries the hope of a more focussed assessment process, where those potentially affected will be closer to agreement on what is important, and what may not be important, including which VCs need to be considered in depth, which may not need to be considered at all or in depth, and what information may be available and needed to adequately understand the significance of individual impacts and the proposed project's contribution to sustainability among other Section 63 determinations required at the end of the assessment process.

Similarly, we have heard that public and interest groups may also not have adequate resources to engage early. Funding, training, use of qualified interest groups to conduct studies and a multi-party advisory committee will all help, but the most important measure would be the explicit noting that early engagement could help shape the final project design (what the project will do, how it will be constructed, operated and decommissioned, etc.) to be more compatible with the interests and aspirations of the public. The consequence of this is that opportunities to discuss alternatives to the designated project and alternative project design must be provided as a part of the pre-planning phase. This is not often the case with later engagement and should be emphasised with all groups reticent to be part of early engagement. The same should be said regarding the building of trust among those participating.

### Scoping

One main purpose of engagement is to determine what needs to be assessed – which valued components (VCs) warrant study. Ultimately, the VCs to be assessed will be specified in the Tailored Impact Statement Guidelines issued by the Agency in the planning phase. These will be based on advice to the Agency provided by the proponent and experts (e.g., impact assessment practitioners, academics, Federal Authorities, Indigenous Elders...) and through meaningful engagement as noted above. For purposes of getting an early start during the pre-planning phase, it is desirable to seek input from these same people/groups, though there are questions about how

these efforts can be organized and recognized under the current IAA regime<sup>5</sup>. The engagement should address not only which VCs should be studied, and what level of detail is likely to be warranted, but also several matters of values, which can be used to determine thresholds for extent of significance, what sustainability means for peoples likely to be involved in the impact assessment process (what ‘sustainability’ and ‘good’ mean in the context of the designated project), how the designated project should be designed and operated to create a good fit with those peoples and the like.

### Alternatives

Another important role that should not be overlooked in pre-planning engagement is that Indigenous communities and the public can suggest project alternatives and alternative means of carrying out the designated project to the proponent and can do so early enough to be both serious and valuable. These alternatives may be able to result in projects more in tune with community environmental concerns, community health, social and economic interests and hence contributing more to sustainability, leading the project to be more in the public interest and hence more likely to be approved at the end of the impact assessment, the classic example of a win-win situation.

### **Preliminary Studies**

One important reason for conducting early studies is to learn how the (relevant) systems function so that subsequent impact predictions will be more reliable and defensible. If this is to be the case, it is important that baseline studies should not only provide a “baseline” but should enhance understanding of the relevant system(s). In addition, because a cumulative effects assessment will likely be required for a number of VCs, it may well be wise to anticipate this when designing and carrying out the early (baseline) studies. For example, in conducting field studies related to water quality, if anomalously high measurements are found and there are flows into the waterbody from nearby sources, at a minimum, field notes ought to be made so that possible cumulative effects would be alerted early. Such information could simplify getting information about other human activities contributing to water quality.

An example of the value of preliminary studies would be the following. Suppose the engagement conducted during the pre-planning phase identifies as a VC an important source of community drinking water downstream of the planned project site as well as some specific water quality thresholds that should not be exceeded if that VC is to be adequately protected. Detailed studies of surface water and ground water as well as of water quality would be important for several reasons: (1) to be able to predict how the designated project would affect this VC; (2) to determine if another project alternative might be better able to protect this VC; and (3) to design the project and build in robust mitigation, and (4) if the project proceeds and, in future, there is a problem, the understanding could well help the proponent fix the problem.

Another benefit of early engagement in combination with early studies is the following possibility. Suppose that engagement identifies that a certain VC is important to people in the

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<sup>5</sup> Note that the addition of Health, Social and Economic matters in the Impact Assessment Act will expand the range of VCs to be considered, both in the pre-planning phase and later in the planning phase. Even more time will be necessary because of this. Hence earlier and likely longer engagement would be in order.

vicinity of the designated project. Suppose, further, that the proponent conducts studies to demonstrate the project's ability to have a positive effect on that VC. Then, the proponent should include in its project description the claim that a positive effect on that VC will follow should the project proceed, and it should provide strong evidence to support this claim. This strong evidence would allow the Agency to adjust and reduce requirements to further study that VC from the TISG, something that would make life easier for all concerned (no need to waste time on a non-problem and one that would provide a positive effect). It would also demonstrate benefits of early engagement (creation of a positive effect on a VC of importance to the community). **Note that the positive effect would still have to be open to scrutiny during the assessment and would then be considered in the section 63 determinations.**

Public engagement on methods to be used in the impact assessment would also be beneficial. Early advice on suitable methods should be encouraged from expert sources, such as from Federal (or provincial or territorial) Authorities or from Indigenous elders and knowledge holders. Transparency in this engagement is key if the goal is to reduce future debates and enhance the acceptance of results obtained. This would require that relevant expertise participate in the engagements undertaken in the pre-planning phase.

Another challenge that arises for many projects subjected to impact assessment is that important VCs are inadequately studied and, for some of those VCs, should the project proceed, upset conditions may arise and not enough is known about why or what to do to remedy the upset condition. With good early planning, the proponent can identify the (hopefully relatively few) situations for which this could happen and can conduct much more detailed preliminary studies. The benefits of such efforts are that the impact assessment for those VCs will be better, design and mitigation more robust, and, should there be future problems, more complete information would be available to help deal with the upsets. This approach would require that the proponent (and others, as appropriate) take extra time (sometimes years) to conduct the more detailed preliminary studies.

## **Agency Response: Pre-planning Activities**

### Multi-Party Advisory Committee

The following approach is a mechanism proposed that could help to determine with whom the proponent should engage and how to do so. While proponents in particular need more preparation prior to commencing the IA process, many have suggested that pre-planning needs to go beyond efforts by the proponent to engage with those most likely to be affected by a proposed project. The Expert Panel, for example, recommended a multi-interest early planning committee to facilitate the exchange of information and consensus building around priority issues, information needs and process design. The Minister's Advisory Council made similar recommendations in its annual report (a working group "as a tool for early engagement and for building Indigenous and public confidence in the assessment process"<sup>6</sup>). While these suggestions were intended for the planning phase, because we view the pre-planning phase as a means of

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<sup>6</sup> Note that such a tool would not replace other tools and need not be used for all designated projects.

commencing the planning phase earlier (to make the overall impact assessment process better), we think this may well be a helpful tool that could commence in the pre-planning phase.

The Minister’s Advisory Council has recommended the use of a multi-party advisory committee (such as is used in some provincial jurisdictions) as “a tool for early engagement”. Specifically, it recommended “that the Agency examine the use of a multi-party working group involving the proponent, Indigenous organizations, regulatory departments, members of the public and outside experts as appropriate, to ensure early engagement and to provide guidance to the Agency with respect to tailoring decisions.” It would be **very important to make clear** to all (the Panel, the Multi-Party Advisory Committee and all participants in the review) **the role of this advisory committee**. Failing that, there could all too easily be confusion in the minds of the public (and in the minds of the Panel and the Advisory Committee) about who is responsible for what.

Even more modest efforts, such as workshops involving experts (both western science experts and Indigenous Knowledge experts) working with the proponent, its consultants and with other interested parties could provide helpful information on aspects of the assessment.

Agency Actions during the Pre-planning Phase

The Agency provided the following material in response to our request for what its current pre-planning activities were. We are generally supportive and, in Table 1, make suggestions based on this input and other discussion below.

Table 1: Agency Actions and Subcommittee Responses to those Actions

Agency Action	Subcommittee Response
Proponents are encouraged to contact the Agency well in advance of submitting the Initial Project Description (IPD)	Strong support.
Pre-planning actions are project-specific and depend on the proponent’s willingness to participate and share information as well as how early they contact the Agency.	Strong support.
Where proponents contact the Agency in advance of submitting an IPD (i.e. during “pre-planning”), the Agency may undertake certain activities on a case by case basis, including: <ul style="list-style-type: none"> <li>○ Provide guidance on the IA process, including engagement</li> </ul>	Very strong support. This is a most valuable role for the Agency.
<ul style="list-style-type: none"> <li>○ Identify and start contacting Indigenous groups</li> </ul>	Extremely strong support. Use full expertise of Government of Canada (and provincial or territorial counterparts) to do this.
<ul style="list-style-type: none"> <li>○ Review draft IPDs, if provided by the proponent</li> </ul>	Very Strong support. This will make for a much better IPD and a better process subsequently.

<ul style="list-style-type: none"> <li>○ Coordinate review and input from FAs, where possible</li> </ul>	Extremely strong support.
<ul style="list-style-type: none"> <li>○ Encourage proponents to start engagement with Indigenous groups and communities in advance of the IPD submission</li> </ul>	Extremely strong support.
<ul style="list-style-type: none"> <li>○ Begin Agency preparations for the planning phase</li> </ul>	Strong support. This can allow the planning tasks to be done. This must be done fairly.

**Agency Roles**

The Agency role can be foundational (educational - explaining the process in the new Act to the proponent and to communities or other parties) and facilitating. Facilitating interactions between the proponent and others and other Federal Authorities can be extremely important. These other federal (or provincial, territorial or Indigenous) authorities have a great deal to offer and their advice regarding engagement, research methods for necessary studies, selection of VCs and the like needs to be provided early. A difficulty with that is that these agencies as well as the Impact Assessment Agency may well lack the human and financial resources to provide their early (pre-planning) input. In this respect, they should be reminded how much easier their review of the impact assessment and the rest of the IA process would proceed if the work was well done (i.e., following good early advice). This would not only make the task of FAs easier, but it would also reflect well on them (and on the Agency). Note that the Agency can play a facilitating role by connecting the proponent (and others) with the relevant FAs, thus playing a valuable role in promoting transparency in the process. Provision of resources to engage in pre-planning activities will more than repay itself with a more effective and efficient impact assessment process.

Another extremely important facilitating role the Agency can play is to help proponents to identify groups of peoples (especially but not exclusively Indigenous peoples) with whom proponents either must engage or should engage as well as some help identifying which individuals should be part of that engagement.

**Procedural Fairness**

It must be pointed out that many of the Agency-identified pre-planning activities are entirely consistent with Subcommittee suggestions or recommendations. We are of the view that, generally speaking, the Agency is on the right track. One aspect about which we have some concern, however, is that some actions may appear to be less than fully procedurally fair. The Agency is an important decision maker once the formal IA process starts, including during the important planning stage. Accordingly, the Agency should conduct itself during the informal pre-planning phase such that it has not given an advantage to some over others in influencing the decisions it has to make once the formal IA process gets under way. Furthermore, it is, in our



view, equally important that the Agency has not given anyone reason to fear (perception) that it has given anyone an unfair advantage in influencing its decisions once the formal IA process gets under way. These same considerations apply during the Planning phase, whether or not a pre-planning phase has happened.

For example, it could be that not all people who ultimately become participants in the IA process are included in the pre-planning phase. Some groups may become involved, but not others. This might seem to give those included undue influence on the process.

The Subcommittee believes the following:

- If the pre-planning phase is limited to capacity building, i.e., informing potential participants about the upcoming process and how they will be able to participate, there should not be any procedural fairness issues. Of course, reaching those in need of capacity building will be important.
- For pre-planning efforts that go beyond sharing information about the upcoming process, this means that procedural fairness obligations attach to the Agency's effort, specifically those that are in some way connected to Agency decisions and determinations in the formal IA process.
- If the engagement goes beyond providing information about the process requirements to encourage early discussions about key planning decisions on scope and process (such as the public participation plan, for example), the basic principle is that all interested parties must have equal opportunity to have input into these discussions.
- The better approach is to only do pre-planning where the proponent consents to a public notice, and to offering equal opportunities to get involved to everyone who indicates an interest. In that scenario, it should be the Agency, not the proponent, that summarizes the outcomes of these discussions.
- At a minimum, the Agency should consult its legal counsel to ensure the pre-planning phase is conducted in a procedurally fair manner.