
IAIA21
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Inter-Governmental Cooperation in IA: A Practitioner's Perspective

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Background

- Long-standing legal provisions for cooperative IA
  - Allow for modified timelines and procedures
  - Establish minimum standards to be met
- Agreements spell out what will be coordinated
- Multi-jurisdictional IAs common
- However, experience with actual cooperative IA mixed

My name is Celesa Horvath and I am an independent Impact Assessment (or IA) practitioner. The perspective I will share today is based on over 30 years of experience working with project proponents and IA process administrators across Canada and internationally.

In many jurisdictions, the legislative or legal framework for Impact Assessment has included provisions for inter-governmental cooperation for a long time. The specific legal wording may vary, but the intent generally remains consistent: they provide for cooperation between jurisdictions, for modifying timelines and procedures, even for substituting one process for another.

They also usually establish minimum requirements for cooperation, such as the factors that must be considered in the assessment and participation of Indigenous groups and the public.

In some cases, implementation is supported by cooperation agreements between jurisdictions, which typically flesh out what the parties will cooperate on, such as sharing of information, coordinating timing of consultation, and minimizing duplication of conditions of approval.

Because of the way jurisdiction over the environment is constitutionally divided in Canada – and I suspect this also may be the case in other countries with national and state-level governments – it is common for projects to require impact assessments by multiple levels of government.

However, even with common long-standing provisions for cooperation, what we typically see in practice falls somewhat short of the ideal.

How well governments *actually* cooperate affects both the *process* and *practice* of IA and I will share some examples of each now.

Implications for Process of IA

- Established policies and practices limit or discourage flexibility
  - Formal templates and guidelines
  - Informal entrenched practices and habits
- Scope of Assessment
  - Lack of integration

On the procedural side, the distinct requirements of each jurisdiction with respect to process steps and scope can create real or perceived conflicts.

While legislation and agreements allow for process steps to be modified to facilitate cooperation, the formal or informal procedures that each jurisdiction typically uses can sometimes get in the way of effective coordination. For example, some jurisdictions have templates for certain assessment documents, like Terms of Reference or Information Requirements, project descriptions, and impact statements. Assessment process administrators are often reluctant to depart from those templates, which makes it more difficult to achieve coordination in practice.

Even where templates do not exist, it can be challenging for a process administrator, especially a less experienced one, to deviate from typical practice, to either provide or accept assessment documentation that is different from what they have seen before. This too, makes it more difficult to achieve cooperation in practice.

Jurisdictional differences can also cloud the scope of assessment. Too often, the additional scope requirements of one jurisdiction – and by that I mean the things that only that jurisdiction needs to consider – are simply tacked on to the Terms of

Reference or Information Requirements of the other, often resulting in an awkward and poorly integrated assessment.

Implications for Practice of IA

- Different decision factors drive different information requirements
  - Significance
  - Sustainability
- Methods requirements and guidance vary
- Definitions also vary

On the practical side, the distinct requirements of each jurisdiction with respect to decision-making at various steps in the IA process also can create real or perceived conflicts.

Different jurisdictions take different factors into account at different steps in the IA process. The information that a proponent needs to provide to support that decision-making necessarily varies and can sometimes conflict with what another jurisdiction wants or expects.

For example, the determination of whether an adverse effect is significant has been a long-standing test in IA. But the consideration of significance is shifting, both in terms of when in the IA process it is considered, for what purpose, by whom, and how. Now, some jurisdictions, like British Columbia, explicitly consider significance only when deciding whether an IA is required, but significance is not mentioned in the legislation as a factor in the final public interest determination. In contrast, the new federal IA legislation in Canada does NOT explicitly consider significance when deciding whether an IA is required, but does consider it as a factor in the final public interest determination – the exact opposite of what British Columbia requires. For practitioners tasked with preparing the documentation that ultimately supports these

decisions, accommodating these differences can be challenging, and cooperative IA does not often acknowledge this. At its worst, we sometimes see one jurisdiction's IA process administrator telling us to include something and the other telling us not to.

Similar challenges arise with other factors, such as "sustainability" which is increasingly included as a public interest decision factor yet is inconsistently defined and considered by different jurisdictions. The practitioner is then left to struggle with coming up with information that will meet the needs of both parties and too often satisfies neither.

A related challenge is that assessment methods also vary across jurisdictions. Some have well-established methodological guidance covering every step, while other jurisdictions take a piecemeal approach, providing guidance in some areas but not others. Managing potentially conflicting methodological requirements create real challenges for the practitioner.

How important terms are defined by each jurisdiction also contribute to practical challenges in a cooperative assessment. For example, how the federal government in Canada defines "environmental effect" differs importantly from how provincial jurisdictions define effects, where the scope of provincial assessments typically takes in a broader range of direct effects that go beyond environmental to include economic, social, cultural, and health effects. In short, what is considered an effect in one jurisdiction may not be in the other, and it often falls to the practitioner to figure out how to appropriately differentiate between them while providing the information needed by both jurisdictions.

Unintended Outcomes…

- Procedural and practical (methodological) uncertainty
- Delay
- Inefficiency
- Loss of confidence in process outcomes
- Chill on investment

These and other procedural and practical challenges in multi-jurisdictional IA can have real negative consequences, including greater uncertainty about process requirements, timelines, and methods, resulting in inefficiencies and delays. This can lead to loss of confidence in both the process and its outcomes, and, in extreme cases, a chill on investment.

Potential Solutions?

- Go beyond legislative provisions to change practices
- IA process administrators need training and support to actually make cooperative provisions work
- Cooperative IA calls for the most experienced process administrators who have experience and confidence
- Need better alignment of key definitions and decision factors between jurisdictions
- Focus should be on **substance**, not process

Legislative frameworks must of course continue to empower governments to work together and establish processes for cooperative IA.

However, to make inter-governmental cooperative IA actually work in practice, we must look beyond legislative provisions to ensure established and entrenched procedures do not limit or discourage the flexibility needed to efficiently cooperate. In this regard, IA process administrators need more training and greater support. More experienced IA process administrators should be the ones tasked with leading cooperative IAs, as they are more likely to have the confidence and experience to apply good judgment and know when and how to appropriately depart from rigid adherence to past practice.

As an aspirational goal, over time and through legislative and policy amendments, we should strive for better alignment of key definitions and decision factors, to minimize inter-jurisdictional conflicts in cooperative IA. Ideally, inter-governmental collaboration should be happening *during* legislative drafting, not just afterwards during implementation.

The final point I will make, and this really addresses all of the challenges I flagged, is

that the focus of inter-governmental cooperation in IA must be on the SUBSTANCE – the environmental outcomes – rather than on the *process* by which an assessment is conducted. It matters far less *how* we go about conducting an assessment than making sure the consequences of a project are sufficiently understood to inform a sound decision.

Let's continue the conversation!

Post questions and comments via chat in the IAIA21 platform.

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