

ENVIRONMENTAL ASSESSMENT TOOLKIT

2ND EDITION
2024



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Chiefs of Ontario Environmental Assessment Toolkit (version II)

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Statement from the Artist



My name is Isaac Trapper and I'm a First Nation photographer from Northern Ontario. My passion is to capture the beauty of the world one shutter at a time.

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Executive Summary

The purpose of this Environmental Assessment Toolkit is to provide you with an overview of the process for an environmental assessment (called an “EA” in this Toolkit), and to outline ways in which you can engage in the EA process in order to assert and protect your rights and interests as well as use your Indigenous knowledge and laws to inform both your First Nation’s decision-making processes and the EA process.

The focus of this Toolkit is on EAs for projects in your First Nation’s traditional territory, which is a different legal context than it is when dealing with projects and developments occurring on reserve lands.¹ However, the tools in this Toolkit will also be useful for First Nations considering the creation of their own EA law for projects on their reserve lands or participating in reviews of projects on their reserve.

This Toolkit is divided into three smaller Modules, each of which focuses on a basket of tools that you can use to get the most out of participating in an EA:



Canadian Legal System Toolkit



Traditional Knowledge and Environmental Assessments Module



Indigenous Laws Toolkit

1 In this Toolkit, “reserve” has the same meaning as it does under the *Indian Act*, RSC 185 c I-5, being “a tract of land, the legal title to which is vested in Her Majesty and that has been set apart for the use and benefit of a band.”

Canadian Legal System Module

The Canadian Legal System Module outlines what an EA is, and describes the limitations of the EA process. There are different types of EAs that can be conducted by the federal, provincial and First Nation governments. For all EAs, the purpose of the process is to identify and assess the potential impacts of a project, such as a mine, an electrical transmission line or construction of a road. Based on the project's size or type, different EA processes will apply. But all EA processes are aimed at identifying and assessing impacts on the surrounding environment.

The term “environment” in an EA includes both the natural environment and human society. Canada and Ontario may use the EA process to assess the impacts of a project on Indigenous rights and interests.

There are limitations to the EA process, including that the EA process and the decision on the significance of impacts **rely on predictions** about impacts. If the predictions turn out to be incorrect, this could mean that the actual environmental impacts for a project end up being more significant than was predicted during the EA. Therefore, after a project begins, it is important that the party pushing the project forward (the “proponent”), government agencies and First Nations all work together to monitor for actual environmental impacts and to assess if the mitigation measures are working, and that there be a process in place to deal with unexpected environmental impacts.

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) enumerates many rights that may be impacted by a project and that also inform how Indigenous Peoples' voices need to be included in an EA process. This Module focuses on the right

to **free, prior and informed consent** (FPIC). FPIC is about more than just giving First Nations the right to consent to a project before it goes ahead and impacts their rights. It is also about the right to a meaningful engagement process to review and discuss the potential impacts of a project. FPIC is not that different from the current Canadian law on the duty to consult and accommodate, which already requires consent when a First Nation has a proven right that may be significantly impacted by a project. At the time of publication of this Module, however, UNDRIP and FPIC are not yet formally included in the EA process in Canada or Ontario. UNDRIP and FPIC should inform Canadian laws and are an important policy consideration for Canada and Ontario, particularly related to the inclusion of Traditional Knowledge in EA processes and the requirement for consent.

There is a lot of uncertainty about FPIC right now, and Indigenous Peoples can use that uncertainty to their advantage. Proponents do not like legal or political uncertainty. In this Module, we outline how First Nations may leverage this uncertainty and advocate for FPIC to be formally included in the EA process and seek the agreement of proponents to hold off on a project unless they first obtain consent from the impacted First Nations.

This Module provides an overview of the Crown's **duty to consult and accommodate** First Nations' rights and interests, and provides a checklist for obligations that First Nations have when engaging in this process. When the Crown is deciding whether or not to authorize a project that may have an impact on Aboriginal and treaty rights (asserted and proven), the Crown has a duty to consult and accommodate the potentially impacted First Nations. The Crown may rely on the EA process to fulfill some of its duty to consult and accommodate. If the Crown fails to meet its duty to consult and accommodate and makes the decision to proceed with the

project, that decision can be challenged in court by the affected First Nations. The Module includes some practical tips for building a helpful “consultation record” that a court will look at to see what happened during consultation if the decision is challenged in a Canadian court.

There are many reasons for a First Nation to participate in an EA process for projects in the First Nation’s territory. EA processes can produce and provide valuable information about a project that will allow the First Nation to assess potential adverse effects. Through the EA process, First Nations can access **funding** from the Crown and/or the proponent to engage **independent reviews** of the proponent’s information and conduct studies on the impacts of the project, including Traditional Knowledge studies. By participating, First Nations can make sure that the EA decision maker has more **accurate information** on which to base their decision. At the end of the EA process, if the project is allowed to go ahead, the EA decision maker can put conditions on the approval – by participating in the EA process, First Nations can **influence those conditions**.

There are opportunities and challenges for First Nations at each stage of the EA process, and in the Canadian Legal System Module, we set out guidance for navigating the challenges of the EA process and making the most of the opportunities.

Traditional Knowledge and Environmental Assessments Module

This module provides guidance for how to share and protect your knowledge. EAs are a public process, and information submitted as part of the process is typically available to governments, the public and proponents. It is, therefore, import-

ant that you have a process in place to protect your knowledge from misrepresentation and misuse.

Regulators are increasingly requiring that Traditional Knowledge be included in their review process. As a result, there is increased pressure from proponents and government regulators to access Traditional Knowledge for the purposes of EAs. While First Nations need to carefully protect their Traditional Knowledge, the increased interest in including Traditional Knowledge does enable First Nations to influence decision making based on the Nation’s own values. Note that Traditional Knowledge (TK) is sometimes referred to as Traditional Ecological Knowledge (TEK) or Indigenous Knowledge (IK); in this Toolkit, we will use Traditional Knowledge (TK).

Indigenous Laws Module

The Indigenous Laws Module offers guidance for codifying your laws so that those laws can guide your reviews of projects as well as decision making about whether or not to consent to a project going ahead.

Many First Nations have codified their laws and several Indigenous scholars have written about sources of Indigenous laws and methods that First Nations can use to revitalize and assert their Indigenous laws. This Module provides an overview of the work of Indigenous legal scholars, as well as how First Nations have used their Indigenous laws to inform consultation and EA processes.

This Toolkit also contains supplementary sections that support the three main modules. These include sections on Traditional Knowledge Protocols, References and Resources, and Conducting a Traditional Knowledge Study.

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Environmental Assessment Toolkit

Welcome

Welcome to the Second Edition of the Environmental Assessment Toolkit developed by the Chiefs of Ontario (the “Toolkit”). The purpose of this Toolkit is to give First Nations tools and tips for participating in and leveraging federal and provincial environmental assessments (referred to throughout as “EAs”) in order to:

1. Ensure Indigenous free, prior and informed consent;
2. Ensure Traditional Knowledge informs the EA process;
3. Facilitate meaningful consultation and accommodation; and
4. Optimize the exercise of inherent Indigenous jurisdiction over lands, waters and resources.

The Toolkit focuses on general tools and tips to help you get the most out of the EA process. It focuses on best practices, offering examples of where First Nations have participated in and directed EA processes in relation to their lands, and it is aspirational in terms of how EAs can be used to protect First Nations’ rights.

The Toolkit does not provide a summary of the existing laws because these laws are always changing. Ontario and Canada provide

summaries of their EA laws on their websites, and we recommend that you look up the most current laws to complement this Toolkit. (See the References & Resources Module for more information.)

This Toolkit is divided into three Modules, offering different types of tools you can use during your participation in an EA process:

1. Canadian Legal System Module
2. Traditional Knowledge and Environmental Assessments Module
3. Indigenous Laws Module

Each Module has **checklists** you can refer to while you participate in an EA. The Modules also have **case studies** throughout so you can learn from the experiences of other First Nations across Canada. In addition, the Toolkit also contains supplementary sections that support the three main modules. These include sections on Traditional Knowledge Protocols, References and Resources, and Conducting a Traditional Knowledge Study.

Origin and Stewardship

Origin: The Elders have stated that Indigenous Peoples know that when the Earth was young, it was part of the Creation Family. The Earth is called Mother Earth, the Moon is called Grand Mother, and the Sun is called Grand Father, and the Sky is called the Father. The Creator of this family is called the Great Mystery. It was the Great Mystery that created everything including the Indigenous People. Water is recognized as the lifeblood of Mother Earth. It flows through her, nourishes her and purifies her, and it is part of the birthing process. The Indigenous Peoples know that the elements were created first, followed by the Earth, then the plants and the animals and the birds and, finally, man or original humankind. Because the original humankind was created last, this being is the baby of the Creation Family and depends on the rest of Creation for its very survival.

Stewardship: The Indigenous Peoples know that they were placed here on Turtle Island and that because of this fact, they have a customary duty and obligation for the stewardship of Mother Earth and all its creatures. The creatures were all bestowed the duty to observe a sacrosanct and harmonious re-

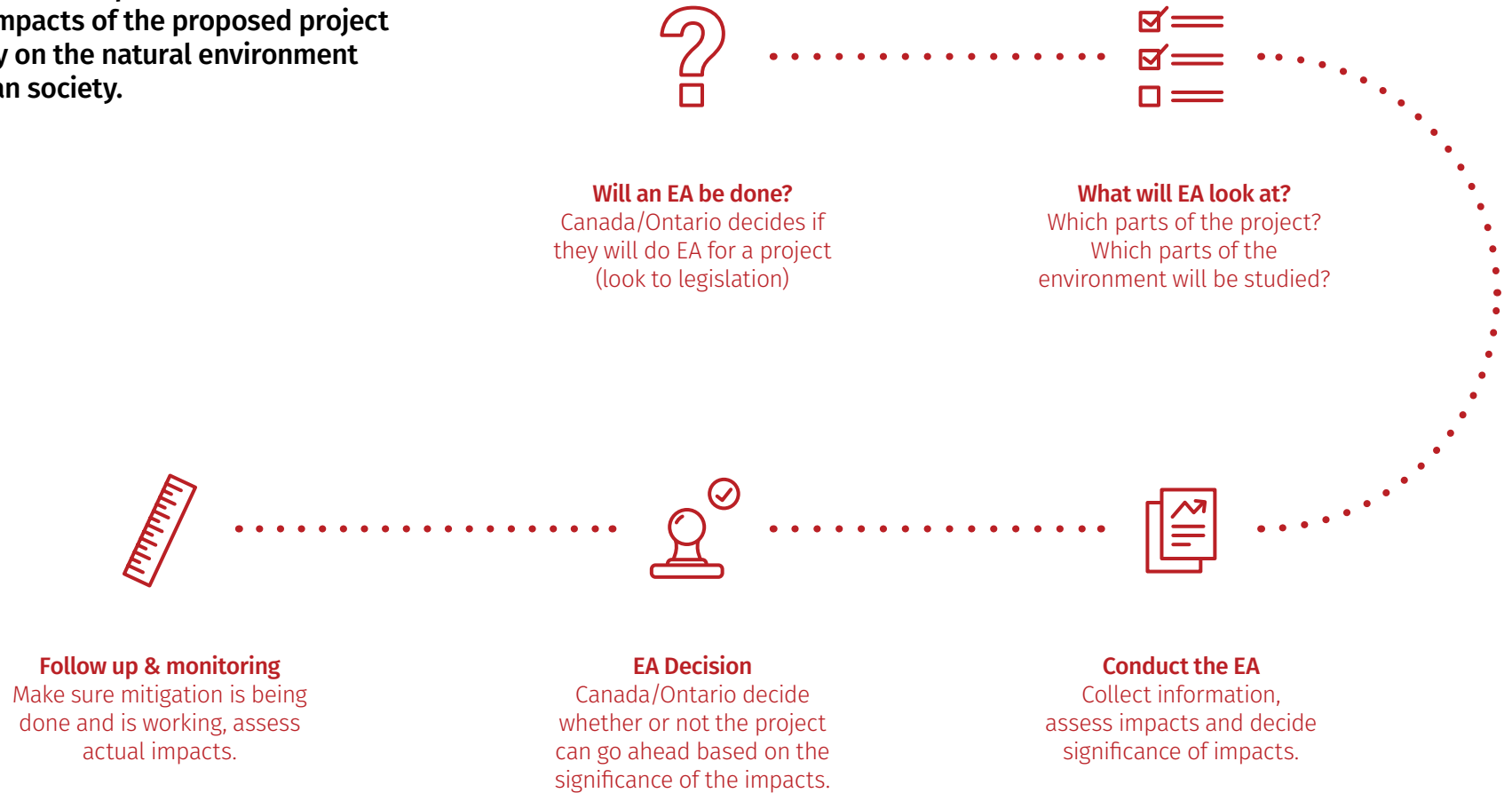
lationship with each other and maintain a harmonious balance amongst each other. This requirement extends to and includes the Indigenous Peoples, who must refrain from any purposeful destruction of the Earth and indeed all of Creation. If they do not heed this sacred instruction, any acts of carelessness will lead to the eventual demise of all people. All people will go away if the earth should die and Indigenous Peoples will not be the only ones to be affected. For this reason, all peoples should not partake in any destructive activity that may permanently alter the state of the environment and Creation.

L.W. Jourdain

What is an Environmental Assessment?

An environmental assessment, or EA, is a **process that is conducted before a proposed project or activity is carried out, to assess and predict the direct and indirect impacts of the proposed project or activity on the natural environment and human society.**

Environmental Assessment Process



Through the EA process, **impacts are assessed, and avoidance and mitigation measures are identified to avoid or reduce the impacts.** “Avoidance measures” typically refer to modifications or changes to the project that are made in order to avoid certain impacts entirely – for example, choosing a different route for a road to avoid important wildlife areas. “Mitigation measures” refer to things that can be done to lessen or offset the identified impacts of a project – for example, if the project calls for clearing a forested area, mitigation measures might include a clause that the proponent needs to replant trees elsewhere or start rehabilitating some areas of the project area when they are no longer needed. (In this Toolkit, “proponent” refers to the party that is pushing the project forward.)

The **EA decision maker** (the government official or department that is in charge of deciding whether the project can proceed) will consider all the identified avoidance and mitigation measures, look at what impacts the project may cause even with mitigation measures (called “**residual impacts**”), and decide how **significant** those impacts are. The EA decision maker will then make a **judgment** about whether or not the project should go ahead, taking into account those impacts and the public interest in the project. The EA decision maker is usually a Minister or other official from the federal or Ontario government.

How significant are the residual impacts (impacts that will not be avoided or mitigated)?



In most EAs, the term **“environment”** is used broadly to include **both the natural environment and human society**. Generally, both the Ontario and federal governments use the **EA process to also specifically assess the impacts of a potential project on the rights and interests of Indigenous Peoples**.

Below are some examples of the **common impacts that are looked at during an EA**:

- Environmental factors:
 - » Land ecosystem;
 - » Freshwater ecosystem;
 - » Marine (ocean) ecosystem;
 - » Air quality;
 - » Animals (numbers, distribution, movements, behaviour); and
 - » Habitat (soil, landforms, water quality, vegetation quality and quantity).
- Health and socio-economic factors:
 - » Population change;
 - » Quality of life indicators;
 - » Community social structure and stability;
 - » Individual and community health risks;
 - » Infrastructure requirements;
 - » Employment and business opportunities; and
 - » Social adjustment programs.
- Cultural factors:
 - » Impacts to traditional land use practices;
 - » Impacts to lifestyles, language and customs;
 - » Impacts to Treaty and Aboriginal rights; and
 - » Impacts to Traditional Knowledge.

The EA process is designed to **answer questions such as**:

- Is the proposed project site identified by the proponent the **best option** for the project?
- Is there a **risk** that the proposed project will have **adverse effects** on the environment or nearby communities? If so, **how much uncertainty** is attached to this risk?
- Have the **potential negative impacts been avoided or mitigated** (made less serious) as much as possible?
- Are the **potential negative impacts significant**, even with mitigation?
- Are the predicted (forecasted) negative impacts or risks **so high that the project should not go ahead?**

The **focus of this Toolkit** is on EAs for projects happening **in a First Nation’s traditional territory, not on reserve land**.¹ EAs off-reserve are done by Canada or Ontario, although this Toolkit will explore ways in which First Nations can conduct their own EA for projects off-reserve that may impact their rights and interests. There are different laws that can apply to on-reserve projects, which are outside the scope of this Toolkit. For example, *First Nations that choose to enact a Land Code under the First Nations Land Management Act* may develop their own EA Law to apply to projects on the First Nation’s reserve. **This Toolkit does not look at Land Codes or First Nation EA Laws under a Land Code in detail, but the tools and tips in the Toolkit may be useful to a First Nation developing or administering its own EA law for on-reserve projects.**

¹ In this Toolkit, “reserve” has the same definition as it is defined in s. 2(1) of the *Indian Act*, RSC 1985 c I-5, being “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.”

There are **different types of EAs** under federal and Ontario laws. Some projects in a First Nation's traditional territory will require in-depth reviews with **public hearings**, while others simply require the proponent to prepare a **checklist of information** and send out **public notice** of the project. Some projects will not require an EA at all. The **federal and provincial EA**

laws and policies guide what type of EA will be conducted and how much public participation will be allowed for a particular project. These rules change over time, so you should look up the latest rules for a particular type of project on the federal and Ontario EA websites.

Spectrum of Participation in EAs



Just as there are different types of EAs depending on federal or provincial jurisdiction, the **requirements for including and considering Traditional Knowledge also vary**. The definition of Traditional Knowledge is specific to each First Nation, as different First Nations have their own experts and their own ways of generating and conveying knowledge. Traditional Knowledge will be discussed in more detail in the **Traditional Knowledge and Environmental Assessments Module**. In some cases, it is referred to as traditional ecological knowledge or Indigenous traditional knowledge, or Indigenous knowledge. In this Toolkit, we use the term Traditional Knowledge (or TK) throughout.

For federally led EAs, it is understood that undertaking an Traditional Knowledge study as part of an EA is a best practice. It is important to seek funding from either Canada/Ontario or the proponent in order to undertake an Traditional Knowledge study relevant to the project in question.

First Nations are encouraged to push Canada and Ontario to not only require that an **Traditional Knowledge study be done as part of an EA, but that the Traditional Knowledge collected actually be used and considered during the EA decision-making process**. Traditional Knowledge should be considered and weighed alongside, and on at least equal footing with, western scientific knowledge. **A Traditional Knowledge study cannot just be about checking a box to say that it was done**.

While EAs are a tool that governments use to assist them in making decisions about a project, the **process is not perfect**. **There are many limitations**, including:

- **EA decisions are based on predictions.** The people involved in the EA, including scientists, are using data to make in-

formed guesses during the EA process about potential environmental impacts. But since the project has not happened yet, the EA decision maker cannot know exactly what is going to happen once the project starts. An EA decision maker can approve a project even if there is not complete certainty about what impacts may happen (Pembina Institute, 2008; Wet'suwet'en Treaty Office Society, 2021).

- **Whether or not avoidance and mitigation measures will work, and how well they will work, is rarely certain when an EA decision is made.** So, it is important that a monitoring program is in place to measure environmental impacts once a project starts. Unfortunately, not all monitoring programs are effective (Lindgren and Dunn, 2010; Gorrie, 2016). To avoid unexpected environmental impacts, the monitoring program **must be mandatory and enforceable, and include regular and sustained communication with stakeholders**, including potentially impacted First Nations (Arnold and Hanna, 2017).
- In making their decision, an EA decision maker has to assess the significance of the predicted residual effects of the project. Different groups may have different opinions on what is significant. **First Nations may find that what is significant to them is not treated as significant during the EA process** (Sallenave, undated). For example, a First Nation may feel that any impact on an important fish habitat is significant, whereas an EA decision maker may decide that some impacts are acceptable as long as enough healthy habitat remains to keep the fish population at a certain level.
- Some EAs **do not include Traditional Knowledge** at all in the assessment. Even when Traditional Knowledge is shared as part of the EA, **it can be unclear where and how the Traditional Knowledge influenced the decision making**. EA decision makers may also give Traditional Knowledge **less weight than western science** in making a decision (Sallenave, undated, pp. 5-6).

Other Resources

- **Government websites:** Canada and Ontario each have their own EA legislation that sets out the particular process they use for assessing the impacts of a project. The legislation and rules are always changing, so for the purposes of this Toolkit we have kept the information more general. **Please refer directly to the relevant federal and Ontario websites for the latest information on their processes.**
- First Nations Major Projects Coalition’s **Guide to Effective Indigenous Involvement in Federal Impacts Assessments.**
- **Indigenous Centre for Cumulative Effects:** This is an independent organization that supports Indigenous communities undertaking cumulative effects work. (The term “cumulative effects” generally refers to the combined effects from past, present and reasonably foreseeable future activities and natural processes.) ICCE is operated by Indigenous people. Its primary objective is to help build and enhance the technical and scientific capacity of Indigenous communities to address cumulative effects. ICCE provides a network for Indigenous communities to access information, resources and best practices about cumulative effects.
- **Traditional Knowledge protocols:** As guidance continues to evolve for the consideration of Traditional Knowledge in EAs, it is important to develop your own Traditional Knowledge process. If time constraints or resources do not permit you to develop a Traditional Knowledge protocol, some Indigenous communities and organizations have developed protocols that are publicly accessible. (See the modules Developing Your Own TK Protocol, and References & Resources.)

Why Should You Participate in an EA?

You should consider participating in an EA for projects that may impact your rights and interests for a number of reasons:

- The EA process may reveal **valuable information** about potential impacts on the exercise of your rights, environmental integrity of your lands and waters, potential disturbances of or proximity to important spiritual and cultural sites, and possible impacts on your First Nation and members. Through the EA, you can evaluate and challenge the information prepared by the proponent on those impacts, and present alternative information for the government decision maker to consider. Learn more about participating in EAs in the Canadian Legal System Module.
- You may be able to obtain resources from the government regulator or proponent to fund **Traditional Knowledge studies** as part of the EA process. Traditional Knowledge studies provide an important source of information that can influence EA decision making, and can also serve other beneficial purposes in the community once completed, such as supporting cultural revitalization programs and activities.
- Following an EA, if a project is approved the EA decision maker can give that approval with terms and conditions on the project. By participating in the EA, you can **influence what is in those terms and conditions** to maximize protection of your rights, lands, culture and people.
- The Crown (federal and provincial/territorial governments) uses the EA process to inform and fulfill parts of their **duty to consult and accommodate**. You can try to get the Crown to consult you on a government-to-government basis and outside of the EA process, but if you do not take the participation opportunities given to you in the EA process to

evaluate and comment on impacts, you risk being seen as frustrating reasonable consultation attempts. See Section 2 of the Canadian Legal System Module for more.

Why Participate in an EA?



Gather information

Get access to proponent and government studies. Opportunity to question and critique studies and get funds to do your own studies and collect data and Indigenous knowledge.



Influence conditions

Use EA process to advocate for specific conditions to be put on the project if it is approved to protect your rights, lands and interests.



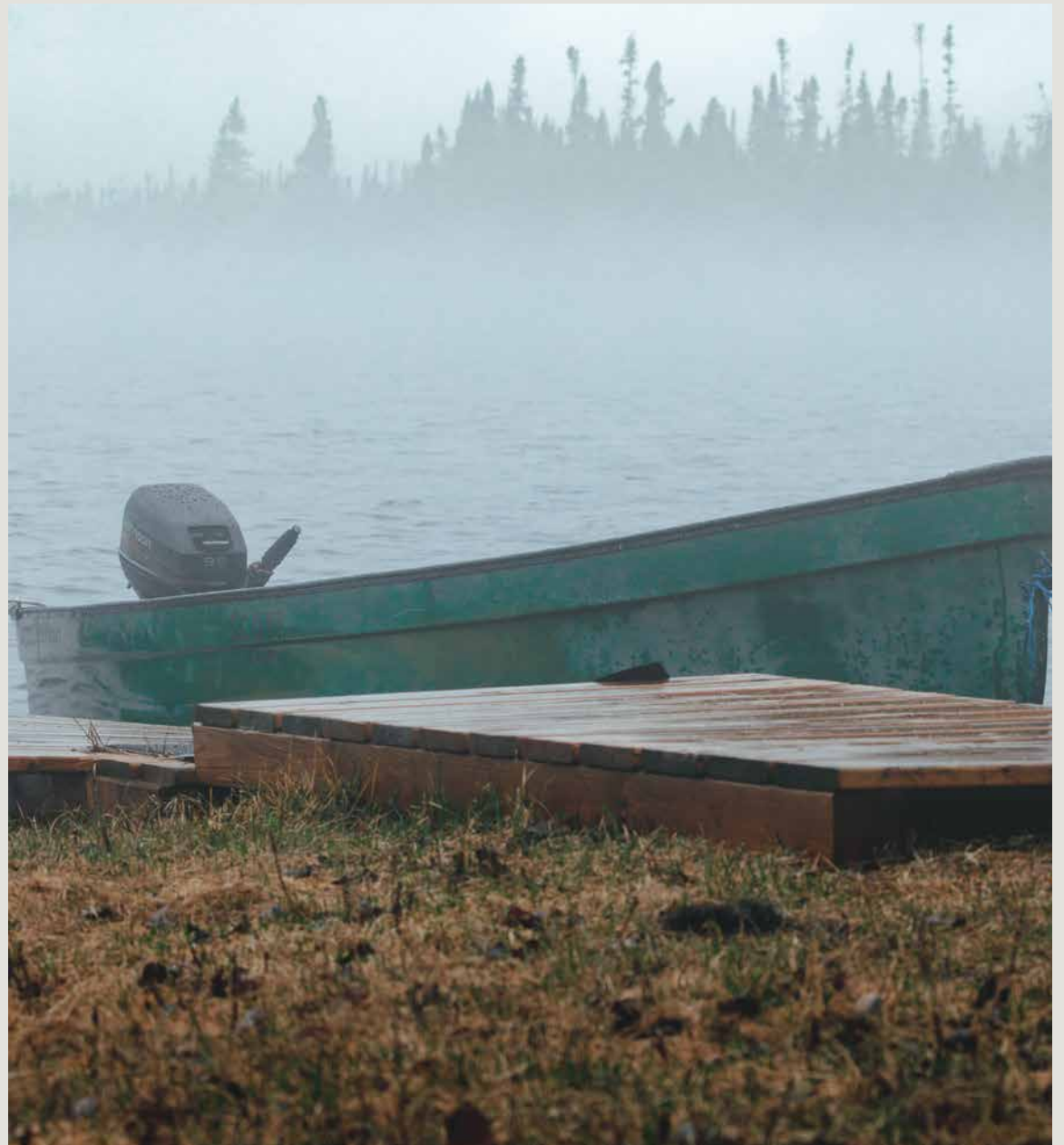
Participate in consultation

Canada/Ontario may rely on the EA to fulfil their duty to consult. If you do not participate, you may not be able to complain later about lack of consultation because you chose not to participate.

REFERENCES

See the References & Resources Module for a full list of references to this section.

Canadian Legal System Module



01

AT A GLANCE

What is in the Canadian Legal System Module

This Module outlines tools for First Nations to participate in federal and provincial environmental assessments (EAs). Canada and Ontario each have their own laws that govern how they conduct EAs, which projects require an EA and what the EA will examine. This Module does **not** include details about the EA laws of Canada and Ontario, as these laws change from time to time. If a project is being proposed on your lands or waters, it is a good idea to consult with a lawyer to find out more about the specific legal requirements and the EA process.

Instead, this Module focuses more generally on the best practices for participating in EA. For all EAs, the purpose of the process is to identify and assess potential impacts of a proposed project on the surrounding environment. This Module goes into detail about how First Nations can participate in and direct EAs.

There are three sections in this Module:

Section 1 – Getting to Consent: UNDRIP, Inherent Jurisdiction and Impact Benefit Agreements

This section provides a summary of rights under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), including free, prior and informed consent (FPIC); how those rights should inform EA; and how

First Nations can leverage these rights in an EA to exercise their inherent jurisdiction and get to consent.

Section 2 – Duty to Consult and Accommodate

This section includes an overview of the Crown's duty to consult and accommodate First Nations about potential impacts on their existing and asserted Aboriginal and treaty rights. The Module includes checklists and helpful tips about key elements of the duty to consult and accommodate, and about how to build a good consultation record in case the EA decision is challenged.

Section 3 – Advancing Indigenous Jurisdiction by Participating in EAs

This section outlines the many opportunities for First Nations when it comes to participating in EAs. Opportunities can include accessing funding for studies, ensuring that projects are only proceeding with accurate information, and influencing conditions on projects that do go ahead. There are also challenges, such as encountering tight timelines or disagreements about the scope of an EA. This section summarizes tips for dealing with and pushing back against those challenges, such as checklists and strategies for participating in all stages of an EA.

SECTION 1

Getting to Consent: UNDRIP, Inherent Jurisdiction and Impact Benefit Agreements

UNDRIP Rights

*The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*¹ is an international document that sets out the minimum standards for the survival, dignity and well-being of Indigenous peoples. Its purpose is to **protect the collective rights of Indigenous peoples** around the world.

UNDRIP was adopted by the UN General Assembly in 2007.² Canada did not officially adopt UNDRIP until 2016.³ While the most well-known UNDRIP

principle is likely **free, prior and informed consent (FPIC)** as outlined in Article 32, there are also other principles in UNDRIP that are useful for First Nations to rely on when dealing with and facing proposed developments that may impact you:

- Right to **self-determination** (Articles 3, 4 and 5);
- Right to **participate in decision making** and maintain institutions (Articles 18, 19, 34 and 40);
- Right to **set own priorities and strategies** (Article 25);

- Right to **make decisions over traditional territory** (Articles 26 and 29)
- Right to **culture** (Articles 8, 11 and 25);
- Right to **financial assistance** (Article 39); and
- Right to **maintain and protect Traditional Knowledge** (Article 31).

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNDRIP, 2007, Supp No 53 (2007) 1.

² *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNDRIP, 2007, Supp No 53 (2007) 1.

³ Canadian governments and the United Nations Declaration on the Rights of Indigenous Peoples. Crown-Indigenous Relations and Northern Affairs Canada. [Canadian governments and the United Nations Declaration on the Rights of Indigenous Peoples \(rcaanc-cirnac.gc.ca\)](https://www.rcaanc-cirnac.gc.ca/en/1524969699696/1524969699696)

The Promise of Free, Prior and Informed Consent

If you are facing a development project with potentially significant impacts on your rights, one of the key UNDRIP rights you can exercise to make sure your rights are protected is the right to free, prior and informed consent (FPIC).

FPIC

- 

1 Free
A consent given voluntarily and without coercion, intimidation or manipulation
- 

2 Prior
Consent is sought far enough in advance of any authorization or start of activities
- 

3 Informed
Consent is obtained by providing information about the project and its impacts that is accessible, in a local language, and objective
- 

4 Consent
Collective decision made by rights holders and reached through a customary decision process of the community

FPIC should, in principle, give you the right to withhold consent from a project that may affect your rights and territory. However, the way in which this is implemented in Canadian law, and particularly in the context of EA, may not always align with that principle. For example, where rights are asserted and not yet proven, governments and proponents (the parties pushing for a project approval at the end of the EA process) may take the position that upon consultation, there is no need to reach consent, and may insist that First Nations do not have a “veto.” This is discussed in more detail in Section 2 on the duty to consult and accommodate.

But FPIC is more than just the right to consent to a project; it is also about the right to a process of meaningful engagement. Such a process takes time. It needs to start early on, ideally in the design phase of the project (prior). It needs to include information sharing and the opportunity for First Nations to do your own information gathering (informed). This meaningful process should enable First Nations to negotiate conditions under which the project will be designed, implemented, monitored and evaluated. Free, prior and informed consent is the goal of a meaningful consultation process.

The EA process can be part of that meaningful engagement leading to free, prior and informed consent, but only if it includes these elements of free, prior and informed so that, at the end of the process, there has been a meaningful engagement between the Crown, the proponent and the affected First Nations so that consent can be given.

The result of the engagement process can be:

- **Consent** from the First Nation;
- **Consent from the First Nation after negotiation and agreed-upon changes made of the conditions** under which the project will be planned, implemented, monitored and evaluated; or
- **Withholding of consent** by the First Nation.

Results of Engagement Process



Consent



Negotiations, changes to project, then consent



Refusal to give consent

In the context of an EA, this could mean one of three things:

1. As a First Nation, you review all of the material, do your own studies and decide to consent to the project as it is being proposed.
2. After studying and gathering information, and talking to the Crown and proponent, you negotiate changes to the project that will minimize impacts to your rights, give you benefits, and provide you with enough comfort that the project will be monitored and amended as needed to protect your rights going forward. After all of this is done, you give your consent.
3. At the end of the meaningful engagement, you decide that you cannot consent to the project: the risks are too high, the mitigation measures are not good enough, or there are not enough benefits coming to your First Nation.

Free, Prior and Informed Consent within Ontario and Federal EAs

FPIC is not that different from what Canadian law already says that the federal and provincial governments have to do when a project may impact Aboriginal or Treaty rights. Canadian law already requires that the consultation process be **fair**, be done **before a decision** is made, must include **sharing information**, and must **not include sharp dealing**, which means that the Crown must not be sneaky or take advantage of oversights made by the First Nation (see Section 2 on the duty to consult and accommodate for more).

Both Canadian law and UNDRIP also require **Indigenous consent in some circumstances**. Where a project may cause serious impacts on proven Aboriginal or treaty rights, consent is required under Canadian law.⁴ However, if the right is unproven, current Canadian law does not require the First Nation's consent before a project can go ahead.

In 2021, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (**UNDRIP Act**). Section 5 of this legislation commits Canada to “take all measures necessary to ensure that the laws of Canada are consistent

What UNDRIP does is expand the requirement for governments to seek consent in good faith to include all situations where the rights of Indigenous peoples may be affected. You can use UNDRIP to support your assertion that meaningful consultation is not just about checking a box for governments: the objective in all cases needs to be obtaining Indigenous consent. The possibility of a First Nation to withhold consent should always be on the table.

with the Declaration [UNDRIP].” Section 4 of the UNDRIP Act affirms “the Declaration [UNDRIP] as a universal human rights instrument with application in Canadian law.” In *Reference re An Act respecting First Na-*

tions, Inuit and Metis children, youth and families,⁵ the Supreme Court of Canada recently commented what this legislation (the UNDRIP Act) means when it comes to UNDRIP's application in Canadian law – that the legislation incorporated UNDRIP into the country's domestic positive law.⁶ In other words, UNDRIP is now part of Canadian law. How Canadian courts are going to apply these comments and this case is yet to be seen, but regardless of the *UNDRIP Act*, **Canadian courts can and should use UNDRIP to interpret Canadian and Ontario laws now**. Under Canadian law, courts have for some time been able to refer to international law when interpreting statutes. This means that courts can look to UNDRIP when they are deciding what a Canadian or Ontario law means, and they can do this in a few ways:

- If a law has a few possible meanings, the court can and should pick the meaning that is most consistent with UNDRIP;
- The court can consider UNDRIP rights when looking at the context in which the

⁴ [Delgamuukw v British Columbia](#), [1997] 3 SCR 1010 at para 168; [Tsilhqot'in Nation v British Columbia](#), 2014 SCC 44 at paras 76-77.

⁵ [Reference re An Act respecting First Nations, Inuit and Metis children, youth and families](#), 2024 SCC 5.

⁶ [Reference re An Act respecting First Nations, Inuit and Metis children, youth and families](#), 2004 SCC 5 at paras 4 and 15.

law was made, in order to better understand what was meant; and

- The court can look at UNDRIP for values and principles that it should use when deciding what a law means.⁷

UNDRIP is a non-binding international declaration, but **UNDRIP restates principles of binding international law**.⁸ So Canadian courts should give UNDRIP the highest weight when referencing it in order to interpret Canadian and Ontario laws.⁹ Further, to the extent UNDRIP principles are international customary law, **Canadian courts should assume that those principles are domestic common law too** unless the international law is clearly inconsistent with a domestic law.

Canadian judges may be hesitant to refer to UNDRIP in interpreting Canadian law because it is something new for them, but

Canadian courts can and should look to UNDRIP when deciding what federal and provincial laws mean (including s. 35 of the *Constitution Act*), and interpret the laws to comply with UNDRIP unless the law clearly does not comply.

they already do this in other contexts. The idea of Canadian courts using international law to interpret Canadian and provincial laws is not new. Judges look to international human rights laws when interpreting the *Canadian Charter of Rights and Freedoms*.

As of the writing of this Toolkit, Ontario's *Environmental Assessment Act*¹⁰ does not mention UNDRIP or FPIC. The federal *Impact Assessment Act*¹¹ does say, in the preamble to the law, that the Canadian government is committed to implementing UNDRIP. However, regardless of what the laws say or don't say, Canada and Ontario are presumed to follow international law unless they clearly state that they are not following it or pass a law that is clearly inconsistent with international law.¹²

It is also important to note that as of the writing of this Toolkit, the federal government looks to UNDRIP to inform its policy on sharing and protecting

Traditional Knowledge in EAs. UNDRIP recognizes that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.” This speaks to the critical role Traditional Knowledge can play in protecting Indigenous peoples, their lands, water, resources and rights.

There is a lot of **uncertainty** right now about how UNDRIP will be interpreted in Canada. You can **use this uncertainty to your advantage** and advocate for the way you want UNDRIP to be interpreted. FPIC can be a process right and require the provincial and federal governments to engage in a process to seek your consent. But FPIC can also be a right to have the provincial and federal governments recognize your decision-making authority to exercise your jurisdiction to review a project and decide if you want to consent.¹³

⁷ [Baker v Canada](#), [1999] 2 SCR 817 at para 70; [Reference re Public Service Employee Relations Act](#), [1987] 1 SCR 313 at 349-350.

⁸ Inter-Parliamentary Union (IPU). 2014. *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians*, N. 23. <https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf>

⁹ [Quebec \(Attorney General\) v 9147-0732 Québec inc.](#), 2020 SCC 32 at paras 30-38.

¹⁰ [Environmental Assessment Act](#), RSO 1990, c E.18.

¹¹ [Impact Assessment Act](#), SC 2019, c 28, s 1.

¹² Many of the principles in UNDRIP, including FPIC, are customary international laws. Customary international laws are presumed to be domestic common law, unless the government passes a law that clearly conflicts with the customary law.

The legal and political uncertainty about UNDRIP leads to uncertainty over development projects. **Proponents do not like uncertainty. Use this to your advantage to:**

1. Advocate for the federal and provincial governments to include FPIC in the EA process; and
2. Convince proponents that the best way to achieve certainty is to recognize FPIC by agreeing not to go ahead with their project without your consent.

How to Protect UNDRIP Rights and Give FPIC Meaning



Undertake public campaigns to explain UNDRIP and why it applies to a particular project that impacts your rights



Negotiate with proponents and Canada/Ontario to get commitment to not go ahead with project without FPIC



Assert your own EA process which includes a process to get to consent



Take legal action in a Canadian court to challenge a government decision that impacts your rights without FPIC



Join international and national groups working on protecting UNDRIP rights



Take direct action to make your voice heard and pressure proponents and Canada/Ontario to not act without consent



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- 13** Papillon, M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335 at 317.

Impact Benefit Agreements to Express FPIC

In the absence of federal and provincial governments clearly including FPIC in the EA process, impact benefit agreements (IBAs) have become a common mechanism used to signal Indigenous consent for a project.

In general, IBAs address the impacts to Indigenous rights by requiring specific terms, conditions and measures that are meant to avoid or at least decrease harm (referred to as mitigation measures); and by offering benefits to the affected Indigenous Peoples to offset those impacts that cannot be avoided. IBAs usually then include a clause that the First Nation consents to or supports the project going ahead if the terms of the IBA are met.

IBAs can take many forms. Some of the topics that can be covered by the agreement are:

Defining the project:

- For multi-phased larger projects, does the IBA just cover a step in the project or the whole project?
- Does the IBA cover past and future projects by the proponent?

Financial considerations:

- Financial benefits for the First Nation might include:
 - » Revenue sharing;
 - » An equity share in the project;
 - » Payment upon project approval and at various points in project completion; and
 - » Royalties paid to the First Nation.
- The IBA might also include capacity funding for negotiations, participating in EA and other review processes, and ongoing monitoring work.

Business opportunities for the First Nation can include things like:

- Carving out contract opportunities for First Nation or member-owned businesses;
- The direct award of contracts to First Nation and member-owned businesses;
- A promise to include bid criteria for contracts that will give preference to First Nation and member-owned businesses; and
- Giving First Nation and member-owned businesses a right of first refusal on contracts.

Employment, education and training:

- Set aside jobs for members of the First Nation.

- Fund or provide training programs for members of the First Nation.

Environmental protection:

- The IBA can include promises about how the project will be operated to minimize impacts to the environment.
- Mitigation measures can be included in the IBA to try to reduce some of the impacts on the environment.
- Mitigation measures should be clear and enforceable.
- There should be a commitment from the proponent to change the mitigation measures if it is found that they do not work as anticipated once the project begins.

Archaeological protection:

- The IBA can include steps the proponent needs to take in order to protect archaeological sites.
- This could include setting out how the First Nation will be involved in protecting and monitoring sites.

Social and cultural interests:

- Identify any possible social or cultural impacts of the project, and include enforceable mitigation measures to lessen impacts.

Protection and use of Traditional Knowledge:

- If the First Nation will be sharing Traditional Knowledge with the proponent, the agreement should include rules on how that Traditional Knowledge can be used, shared and protected.

Project certainty:

- The main reason that a proponent enters into an IBA is to resolve the uncertainty that comes from the possibility that a First Nation will oppose a project.
- The proponent will likely require that the First Nation formally consent to the project as part of the IBA.

Monitoring plans:

- It is important that the IBA contain an enforceable monitoring plan so that the proponent monitors how well the mitigation measures work as well as the severity of impacts of the project.
- If mitigation measures do not work as expected or there are impacts that were not anticipated, the agreement should require the proponent to make changes.
- Ongoing communication between the First Nation and the proponent will be key to make the monitoring plan effective.

Future impacts including remediation plans:

- The IBA may also address future impacts of the project or future stages of the project, including remediation once the project is complete.

Dispute resolution:

- If issues arise during the life of the project, the First Nation will want to have a way to address disputes.
- Dispute resolution terms in the IBA may state that the parties will use mediation or arbitration, instead of going to court to fight about issues that may arise.

While IBAs can often be a way to secure FPIC and signal consent to a project or development on certain terms, it is important to keep in mind the following **cautions**:

- There is often a **power imbalance** between the proponent and the First Nation.
- Some First Nations may feel they have **no choice but to consent** to the project because the project will go ahead even without their consent. So, the negotiations become less about impacts of the project and getting to consent, and more about how much money and benefits the First Nation can get from an inevitable project.

- IBA negotiations should include community deliberations in which full information about the project is presented; if an IBA is signed **without full information** about the impacts of the project, there is a risk that it will not adequately deal with mitigation and impacts. As such, Traditional Knowledge studies provide an important source of information to guide IBA negotiations.

Given these cautions, **First Nations should also advocate for FPIC to be included in federal and provincial EA processes in addition to negotiating with the proponent to address impacts to get to consent.**

CASE STUDIES –
Asserting Your Right to FPIC

CASE STUDY

CREE NATION OF JAMES BAY MINING POLICY¹⁴

The Cree Nation of James Bay concluded a treaty with Canada and Quebec in 1975. Often referred to as a modern treaty, it recognizes the Cree Nation's authority to review proposed development projects in their territory through a review board. However, the treaty does not require Cree Nation consent before a project in their territory can go ahead. The review boards are advisory in nature; the federal and Quebec governments keep final decision-making power for projects.

The Cree Nation created their own Mining Policy, which set criteria for expressing consent to a project and made negotiation of an IBA a requirement before the Cree Nation would consent to a project in their territory. The Mining Policy did not have legal authority under Canadian or Quebec law. Its power came from the Cree Nation's ability to use it to influence proponents as

well as the federal and provincial governments. If a proponent failed to follow the Mining Policy, they faced legal uncertainty and public scrutiny.

The Mining Policy was tested with the Matoush Uranium Mine. Many Cree hunters opposed the project. The federal and Quebec review boards recommended that the project go ahead but included as a condition that the proponent obtain social acceptability for the project, which could be shown by the Cree Nation's endorsement or consent to the project. The Cree Nation refused to negotiate an IBA because of the lack of consent over the project, and issued a moratorium on uranium mining for their territory.

In the end, Quebec did not authorize the project, citing lack of social acceptability of the project. The proponent sued Quebec over the refusal to approve, but lost. The Quebec Court of Appeal found that Quebec was allowed to base its refusal to approve the project on the lack of social acceptability of the project.¹⁵

The Cree Nation asserted their jurisdiction and went ahead and established their own process to review and consent to a project. They used political pressure and the threat of legal uncertainty to ensure that the project did not go ahead without their consent.

14 This case study was explained in Papillon, M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335.

15 [Ressources Strateco Inc. v Quebec \(Procureure Générale\)](#), 2020 QCCA 18 at para 6.

CASE STUDY

SQUAMISH NATION¹⁶

There was a proposed Liquefied Natural Gas project in Sḵwxwú7mesh Úxwumixw (Squamish Nation) territory in British Columbia. Squamish Nation asserted its jurisdiction to make a free and informed decision about the project. Squamish Nation created its own impact assessment process to make its own decision on the value of the project.

Squamish Nation's impact assessment process had not been recognized as valid or enforceable under Canadian or British Columbia law, so there was the risk that the process would be seen as symbolic only. However, Squamish Nation was able to leverage the threat of legal challenge and the uncertainty, costs and delays associated with that to convince the proponent to agree to support and abide by their impact assessment. The federal and

provincial governments were reluctant to recognize that Squamish Nation had the authority to hold its own assessment process. But Squamish Nation moved forward, and the proponent and Squamish Nation entered into an agreement where the proponent would fund the assessment and provide information, and agreed to consider any mitigation measures proposed through the process and to respect the outcome. The parties also agreed that the process would be confidential.

In the end, the proponent eventually accepted all 25 conditions and mitigation measures proposed through Squamish Nation's assessment process, and Squamish Nation then formally endorsed the project and agreed to an IBA.

This example illustrates that, as a First Nation, you do not need to wait for recognition or permission from the federal or provincial government to assert your jurisdiction over assessing projects in your territory. You can try to leverage your rights to persuade the proponent to get onside with your assessment outside of the federal or provincial processes.

16 This case study was explained in Papillon, M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335.

CASE STUDY

SAUGEEN OJIBWAY NATION – DEEP GEOLOGICAL REPOSITORY¹⁷

The Chippewas of Nawash Unceded First Nation and the Saugeen First Nation (together the Saugeen Ojibway Nation [“SON”]) are both located on the Saugeen (Bruce) Peninsula in Ontario. For over 40 years, there has been a nuclear power plant in their territory. It was built and has been operated without consultation with SON. SON has proven and asserted Aboriginal and treaty rights, including a proven commercial fishing right and active court cases asserting other rights.

The proponent, Ontario Power Generation (OPG), proposed to build a deep geological repository to store nuclear waste in SON’s territory.

The project underwent an EA coordinated jointly by Canada and Ontario (referred to as a joint review panel). In the agreement establishing the joint review panel,

it was noted that SON’s rights might be adversely affected by the project, and one of the purposes of the EA was to gather information on impacts to SON’s rights. SON participated in the EA process but also engaged directly with the proponent about impacts. In 2013, SON was able to secure a commitment from OPG that OPG would not move forward with the construction of the project without SON’s consent.

The joint review panel concluded that the project was not likely to cause significant adverse effects provided that all mitigation measures were implemented. However, the Crown still needed to discharge its duty to consult and accommodate SON, and the OPG still had to honour its commitment to get consent from SON.

In January 2020, SON members voted ‘no’ to the project. OPG honoured its commitment and is not going ahead with the project as proposed. SON exercised its Aboriginal and treaty rights and its right to give free, prior and informed consent, and was able to stop the project from happening in its territory because its members did not consent.

17 Narine, S. February 4, 2020. Overwhelmingly rejected: Deep geological nuclear waste repository a no-go for Saugeen Ojibway Nation. *Windspeaker*. <https://windspeaker.com/index.php/news/windspeaker-news/overwhelmingly-rejected-deep-geological-nuclear-waste-repository-no-go>

SECTION 2

Duty to Consult and Accommodate

Ontario and Canada may rely on EA to fulfill at least parts of their duty to consult and accommodate Indigenous rights holders.

What is the Duty to Consult and Accommodate?

Where a project may cause significant impacts to your rights, accommodation is required. **Accommodation means changes will be made to the project to avoid irreparable harms and to minimize the effects of the project on your rights.**¹⁸

The **Crown has the duty to consult and accommodate Indigenous rights holders any time their asserted or proven Aboriginal or treaty rights may be impacted by a Crown decision.**¹⁹ The duty flows from s.

35 of the *Constitution Act*, which says that the existing Aboriginal and treaty rights of Indigenous Peoples in Canada are recognized and affirmed. The duty is grounded in the honour of the Crown.²⁰

What the Duty to Consult and Accommodate is Not

Under Canadian law, the duty to consult and accommodate does not necessarily recognize First Nations' distinctive decision-making authority, let alone sovereignty on the land. While consultation can be a jumping-off point for First Nations to

assert and protect their rights and their jurisdiction, it can also be used by the Crown as a tool toward justifying infringements of Indigenous rights.

Who is Responsible for Consulting and Accommodating?

The Crown – which includes the **federal government, provincial governments, and sometimes municipalities** – has the duty to consult and accommodate.

While it is the Crown that has this duty, the **Crown can delegate procedural aspects**

¹⁸ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 47.

¹⁹ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 35.

²⁰ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 16.

of the duty to third parties.²¹ This means that the Crown can delegate some of the consultation and accommodation to the proponent.

In the context of EAs, the Crown can also delegate some of its duty to the administrative body that is undertaking the EA for the government. For example, the federal Crown may delegate parts of the duty to consult and accommodate to regulators such as the Canada Energy Regulator and the Canadian Nuclear Safety Commission. So, Canada and Ontario can rely on the EA process to fulfill much of their duty to consult and accommodate. However, the honour of the Crown cannot be delegated, and the **Crown must maintain oversight over the consultation** that occurs and cannot approve the project until the Crown is satisfied that the duty has been met.²²

Note that **even if Canada or Ontario do not conduct an EA for a project proposed within a First Nation’s territory, the Crown may still have a duty to consult with and accommodate the First Nation if the project may negatively impact the First Nation’s rights and interests.** So, the principles in this section of the Toolkit apply to all projects in a First Nation’s traditional territory that may negatively impact the First Nation’s rights and interests, regard-

less of whether or not there is an EA for the project.

If there is an EA process but it does not provide enough opportunity for meaningful consultation or accommodation, then the Crown must provide other ways for the First Nation to engage in meaningful consultation and achieve accommodation outside of the EA process. In practice, this means that the Crown will use the EA process as the vehicle to engage First Nations in consultation. However, if the **EA process does not give you a full opportunity for meaningful consultation, then you can demand that the government engage outside of the EA process to fulfill their duty.** You can do this by writing to the Crown to indicate that there is a need for more consultation or asking for a more robust EA, and, if that fails, bringing a judicial review application challenging the Crown decision to approve the project without discharging its duty.

When is the Duty to Consult and Accommodate Triggered?

The duty to consult and accommodate is **“triggered” when the Crown has knowledge, whether real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect those rights.**²³ “Triggered” means that the Crown is required to consult and accommodate.

There are three parts to the test to trigger the duty:

1. The Crown has knowledge of your rights;
2. The Crown is contemplating conduct; and
3. The Crown conduct may adversely affect your rights.

²¹ [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para 56.

²² [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 25; [Michipicoten First Nation v Ontario \(MNR\)](#), 2016 ONSC 6899 at para 86; [Tseil-Waututh Nation v Canada](#), 2018 FCA 153 at para 517.

²³ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 35.

Knowledge of Your Rights

To be triggered, the Crown has to have **“real or constructive” knowledge of your rights**. The threshold here is not high. The Crown has to either actually know about your claim to rights in the area of the project (real knowledge), or the project will be on lands that are known or could reasonably be suspected to have been traditionally occupied by you and so the Crown ought to know you would have impacted rights (constructive knowledge).²⁴

First Nations have an obligation to clearly outline the claim to rights that may be impacted by a project, and **ensure that the Crown is aware of that claim**.²⁵ The Crown does not have a duty to seek out and consult First Nations unless the Crown has that real or constructive knowledge that your rights may be impacted.²⁶ Some of the **ways the Crown can get that knowledge of your rights** include:

- You have filed a claim in court setting out the nature of your rights, and the Crown is party to that case;
- You have told the Crown about your rights in negotiations or consultations for other projects;
- The rights at issue are treaty rights, so the Crown is assumed to know about them; or

- You have sent the Crown notice asking for consultation in respect of the activities proposed in your territory and have provided a map or other support for your claim that the project may impact your rights.²⁷

You do not need to have a strong claim to rights in the area to trigger the duty to consult.²⁸ But the strength of your claim becomes relevant for deciding the scope of the content of the duty owed – or, in other words, how much consultation is required.

Crown Contemplating Conduct

The proposed Crown conduct can be an exercise of a power under a statute, such as an approval for a project or issuance of a permit. The Crown conduct can also be a strategic, higher-level decision such as a planning decision.²⁹ In the context of EAs, the Crown conduct is usually either:

- a Crown approval of a project or granting of a permit, licence or authorization for a project; or
- a Crown-led project such as an infrastructure or utility project.

Conduct May Adversely Affect Your Rights

You must show that there is a causal connection between the proposed Crown conduct and the potential for adverse impacts. This means that the Crown conduct is what is going to cause an impact on your rights. Addressing past wrongs is not enough.³⁰

The Crown should take a generous approach here, but guessing that there could be an impact will not be enough without a bit of support to show that impacts will likely follow from the Crown conduct.³¹

²⁴ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 36; [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para 40.

²⁵ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 36.

²⁶ [R v Desautel](#), 2021 SCC 17 at para 75.

²⁷ [Mikisew Cree First Nation v Canada \(Minister of Canadian Heritage\)](#), 2005 SCC 69 at para 34.

²⁸ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 37.

²⁹ [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para 44.

³⁰ [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para 45.

³¹ [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para 46.

What is the Content of the Duty to Consult and Accommodate?

The content of the Crown's duty to consult and accommodate will depend on a preliminary assessment of both:

1. the strength of your claim to Aboriginal or treaty rights in the area; and
2. the potential impact of the proposed project or activity on your rights.³²

Strength of Claim

For the first part, the Crown will look at evidence you may provide to assess the strength of your claim to an Aboriginal or treaty right in the area of the project or activity that may be impacted. While there is no obligation on First Nations to provide this information, the **Crown will assess the strength of your claim based on the information that it has**, so if you are able to send the Crown information to support the strength of your claim, it will help in establishing that deeper consultation and accommodation is required.³³

Potential Impact of Project

The Crown should look at the nature of the potential impacts. Will they cause irreversible harm to your rights? Can the

impacts be mitigated by the imposition of conditions on the project? The more severe the potential impacts, the higher the level of consultation that will be required.

It is often difficult for a First Nation to know the nature of the impacts of a project without having information from the proponent and hiring your own experts to help you interpret that information and assess the potential impacts. The **content of the duty to consult can change over time** as more information is gathered.³⁴ So if new information reveals that severe impacts are likely, the Crown should change the level of consultation it is engaging in with you.

Spectrum of the Content of the Duty to Consult

Once the strength of the claim and the seriousness of the potential impacts have been assessed, the Crown can assess the content of the duty it owes. The content of the duty to consult and accommodate required lies on a **spectrum**. At the low end,

the duty may require only that the Crown notify you that the activity will take place on your traditional territory. At the high end of the spectrum, the Crown is required to engage meaningfully on all aspects of the project, and adequately accommodate your rights by making changes to the project as needed to mitigate impacts.

The duty to consult and accommodate may extend to requiring that the First Nation **consent to the project** if the potential impacts are very serious and the right is proven.³⁵ First Nations are encouraged to advocate for the inclusion of FPIC in consultation and accommodation. As discussed in the section on FPIC, the purpose of the duty to consult and accommodate ought to be obtaining the First Nation's consent for the project, and the Indigenous government's power to withhold consent should be present throughout the process. For Canada, Ontario and proponents, getting the consent of an affected First Nation avoids the legal uncertainty, delays and expense of a potential court challenge.³⁶

³² [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para [36](#).

³³ [Saugeen First Nation v Ontario \(MNRF\)](#), 2017 ONSC 3456 (Div Ct) at para [74](#).

³⁴ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para [45](#).

³⁵ [Delgamuukw v British Columbia](#), [1997] 3 SCR 1010 at para [168](#).

³⁶ [Tsilhqot'in Nation v British Columbia](#), 2014 SCC 44 at para [97](#).

Guidance on the Duty to Consult and Accommodate

Canadian courts have made findings that help us understand requirements of the Crown in a given case. Below is a summary of the general principles of consultation:

- Consultation must begin at the **earliest stages** of planning and cannot be postponed.³⁷

Obligations of First Nations

Canadian court have said that Indigenous rights holders that are engaged in consultations with the Crown also have obligations. You must not frustrate the Crown's reasonable good faith efforts to engage in consultation and you cannot take unreasonable positions that thwart the Crown's efforts,⁴⁹ which in some cases means that you cannot refuse to meet the Crown to discuss the project without good reason.⁵⁰ You are also required to define your rights and the potential impacts with clarity (see more in Section 3 on gathering your team).⁵¹

- Governments must consult in **good faith** and with an **honest intention of substantially addressing** Indigenous rights holders' concerns.³⁸
- Consultation has to be **more than an opportunity** for the First Nation to **"blow off steam."**³⁹
- Consultation has to be **meaningful.**⁴⁰
- To have meaningful participation in consultations, a First Nation must have **sufficient expertise and resources.**⁴¹
- The **Crown must act with honour and integrity** during the process and avoid sharp dealing.⁴²
- **Crown officials must have the required powers to change the project**, because consultation without the possibility of accommodation is meaningless.⁴³
- The **Crown must listen carefully** to First Nations' concerns and work to minimize adverse effects on Aboriginal rights and treaty rights.⁴⁴
- The **level of consultation owed may change over time** as the process moves forward and new information may come to light.⁴⁵
- Crown officials should be **open to abandoning or rejecting proposals.**⁴⁶
- If the decision is made to proceed, the **Crown should demonstrably integrate responses to First Nations' concerns** into revised plans of action and explain how Indigenous input, including Traditional Knowledge, influenced the Crown's decision.⁴⁷
- If suggestions from First Nations for changes to a project are rejected, an **explanation is required.**⁴⁸

³⁷ [Louis v British Columbia \(Minister of Energy, Mines and Petroleum Resources\)](#), 2013 BCCA 412 at para 106.

³⁸ [Delgamuukw v British Columbia](#), [1997] 3 SCR 1010 at para 168.

³⁹ [West Moberly First Nations v British Columbia \(Chief Inspector of Mines\)](#), 2011 BCCA 247 at para 144.

⁴⁰ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 10.

⁴¹ [Saugeen First Nation v Ontario \(MNRF\)](#), 2017 ONSC 3456 (Div Ct) at para 26.

⁴² [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 19.

⁴³ [Mikisew Cree First Nation v Canada \(Minister of Canadian Heritage\)](#), 2005 SCC 69 at para 54.

⁴⁴ [Mikisew Cree First Nation v Canada \(Minister of Canadian Heritage\)](#), 2005 SCC 69 at para 64.

⁴⁵ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 45.

⁴⁶ [Gitxaala Nation v Canada](#), 2016 FCA 187 at paras 233-234.

⁴⁷ [Halfway River First Nation v British Columbia \(Ministry of Forests\)](#), 1999 BCCA 470 at para 160.

⁴⁸ [West Moberly First Nations v British Columbia \(Chief Inspector of Mines\)](#), 2011 BCCA 247 at para 148.

⁴⁹ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at paras 36, 42.

⁵⁰ [Coldwater First Nation v Canada](#), 2020 FCA 34 at para 56.

⁵¹ [Haida Nation v British Columbia \(Minister of Forests\)](#), 2004 SCC 73 at para 36.

Cumulative Effects

While the duty to consult and accommodate is about future actions, it does not happen in a vacuum; the **historical context is essential** to properly understanding the seriousness of potential impacts.⁵² For example, if the local wildlife population has already been devastated by past projects in your territory, that is relevant to assessing the impact of another project. Where the rights are already impacted, any new impact will be more significant.

Likewise, the Crown also has to look at the project in the context of what other projects may flow from it. The consultation should look at the **overall project and not just the current small step**.⁵³

To decide if Aboriginal or treaty rights have been infringed, a court will look at **cumulative effects of Crown actions**. When the cumulative effects of projects have significantly diminished First Nations' ability to exercise their rights, the Crown may be found to have infringed s. 35 rights.⁵⁴

When engaging with the Crown, **you should document and communicate how the sum of Crown action in your territory is impacting the exercise of your rights**. For consultation to be meaningful, each project needs to be considered

in the context of what has happened and what will happen, and what effect all of that has on your rights.⁵⁵

Traditional Knowledge is particularly helpful in understanding cumulative

impacts in any given territory as well as cumulative impacts over time. So, it is essential that the Crown or proponent fund you to collect Traditional Knowledge that will be used to assess and evaluate cumulative impacts.

Yahey v British Columbia

Blueberry River First Nation (BRFN) argued that cumulative effects from provincially authorized activities, projects and developments – including oil and gas, forestry, mining, hydroelectric, and agriculture – within and adjacent to their traditional territory resulted in significant adverse impacts on the meaningful exercise of their treaty rights. BRFN argued this amounted to a breach of Treaty 8 obligations by the Crown. The Crown argued the test for treaty infringement is whether so much land has been taken up in BRFN's traditional territory that members cannot meaningfully exercise their treaty rights. The Court determined that the Crown did breach its honourable and fiduciary Treaty 8 obligations to BRFN. The Court found that the Crown has “taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for [BRFN's] meaningful exercise of their treaty rights... has therefore unjustifiably infringed [BRFN's] treaty rights in permitting the cumulative impacts of industrial development” (Yahey v British Columbia, 2021 BCSC 1287 at para 1894).

⁵² [West Moberly First Nations v British Columbia \(Chief Inspector of Mines\)](#), 2011 BCCA 247 at para 117.

⁵³ [West Moberly First Nations v British Columbia \(Chief Inspector of Mines\)](#), 2011 BCCA 247 at para 125.

⁵⁴ [Yahey v British Columbia](#), 2021 BCSC 1287 at para 3.

⁵⁵ [Yahey v British Columbia](#), 2021 BCSC 1287.

Funding for Consultation and Accommodation

In order for you to meaningfully participate in the consultation process, you will likely need funding. It is not reasonable for the Crown to expect you to use your own community resources to review and evaluate someone else's project.⁵⁷ If **you do not have adequate funding, this may significantly impair the quality of the consultation process** because it will not be a level playing field.⁵⁸ You need funding for staff to engage with the Crown, to hire your own experts to review information about the project, and sometimes to engage in your own studies, including Traditional Knowledge studies, and review processes.

Funding is Crucial

Appropriate funding is essential to a fair and balanced consultation process so that the playing field is fair.⁵⁶ This includes funding to hire western science experts to help you understand and evaluate proponent studies as well as funding to conduct a Traditional Knowledge study. See Section 3 for more on gathering your team, as well as the studies and work you may want to do in order to be able to meaningfully engage in consultation. The funding of studies alone is not consultation, but the information that will come from those studies is essential for you to be able to adequately understand the potential impacts of the project so that informed consultation can occur, and accommodation measures can be negotiated.

⁵⁶ [Saugeen First Nation v Ontario \(MNRF\)](#), 2017 ONSC 3456 (Div Ct) at para 27; [Enge \(North Slave Metis Alliance\) v Mandeville](#), 2013 NWTSC 33 at para 269.

⁵⁷ [Saugeen First Nation v Ontario \(MNRF\)](#), 2017 ONSC 3456 (Div Ct) para 158.

⁵⁸ [Clyde River \(Hamlet\) v Petroleum Geo-Services Inc.](#), 2017 SCC 40 at para 49.

Consultation Checklist

Steps First Nations should take when participating in consultations with the Crown



Notify the Crown that you have rights in the area of the project that may be impacted.



Give the Crown detail about the nature of your rights near the project. This may require more study (e.g., Land Use Study, IK study), which the Crown or proponent should fund.



Hire your own scientific advisors to review and critique the proponent's studies. The Crown or proponent should fund the cost of hiring your own advisors.



Conduct any studies needed to properly assess the impact of the project on your rights.



With the help of your advisors, tell the Crown about the potential impacts of the project on your rights.



Do not refuse to meet with the Crown, unless it is reasonable to refuse in the circumstances.



Build a consultation record that shows that you are willing to meaningfully engage in consultation.



What Happens if the Crown Does Not Fulfill the Duty to Consult and Accommodate?

If the Crown does not fulfill its duty, then the contemplated Crown conduct should not go ahead. For example, the Crown should not approve a project through an EA or grant the required authorization until the duty is fulfilled. If the Crown goes ahead with the action and you do not think that the Crown has fulfilled its duty, then you can challenge the Crown's decision to proceed. A common way to do that is to **bring a claim in court through a judicial review** of the Crown decision. The court will look at the project details and the consultation that occurred, and decide if the duty was met. The court could let the project go ahead, revoke the decision, or send it back for more consultation.⁵⁹

While you wait for the court case to be heard, there is a risk that the Crown and proponent will go ahead with the project. You can negotiate for an agreement to stop the project until the case is decided or, if you cannot get the agreement, it is possible to bring an application for an injunction – that is, seeking a court order to make the work stop until the case is decided. The legal test to get an injunction is very strict.

If you are in a situation where you are thinking of bringing a legal challenge or application for an injunction, you should seek legal advice before doing so.

Participating in the Consultation Process While Building a Case to Challenge

While the hope is that the Crown will always engage in a meaningful consultation process and accommodate your rights, that does not always happen. It is important that while you engage in any consultation process – including consultation that takes place in an EA – you keep a record of all communication and meetings so that if the Crown does not fulfill its duty, you have the evidence you need for a court challenge.

⁵⁹ [Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council](#), 2010 SCC 43 at para 37.

How to Build a Good Consultation Record



Develop an **internal record-keeping system**. You can print everything and keep it in a paper file or use an electronic filing system to keep documents related to a project together.



Keep all emails and copies of letters sent and received.



Prepare dated and signed **meeting minutes** after important phone calls and meetings and **send a copy of your notes to the Crown** for their file.



Consider **following up** a phone call or meeting with a **written letter** confirming what was discussed and next steps.



For important correspondence, **use letters instead of emails**. Emails can get bogged down with replies, making the chain of communication hard to follow.



Sometimes letters are drafted but never sent. For sent letters, use a stamp or handwrite on the letter the date and how it was sent so that you can **confirm it was sent** and is not just a draft.



When in doubt, **put it in writing**. Written evidence will likely have more weight than your oral evidence given later describing what you remember happened.



Send the Crown copies of all documents you want them to consider so that the **Crown can include those documents in its “consultation record.”** If it is not in the consultation record, you may need the court’s permission to use it as evidence.



If you think that the proponent or Crown is not sharing all information with you, file a **freedom of information or access to information request** asking for all correspondence and documents related to the project and consultation with you.



Make sure your written correspondence reflects a **willingness to participate in a meaningful consultation process**.



CASE STUDY

SAUGEEN OJIBWAY NATION AND AGGREGATES MINING⁶⁰

The Saugeen First Nation and the Chippewas of Nawash Unceded First Nation (together the Saugeen Ojibway Nation [“SON”]) challenged a decision by Ontario to approve a quarry in SON’s traditional territory, on the basis of inadequate consultation.

In 2008, T&P Hayes – a quarry operator – applied to the Ministry of Natural Resources and Forestry for a licence to operate a limestone quarry in SON’s territory, right next to lands that were subject to a claim filed by SON in court. Despite that, SON did not find out about the application until 2011. Once they found out about the application, SON wrote to Ontario flagging that the duty to consult and accommodate was triggered.

From there, there was over five years of back and forth between the First Nations and Ontario. SON maintained the position that consultation was required, and that they needed funding to be able to review the impact studies that had been completed (about natural environment, lands and water) in order to identify potential adverse impacts. The Crown and the proponent disagreed, taking different positions at different times over the years about whether consultation was required and what level of consultation was due. While there were years of exchanged letters and some meetings, the record showed that none of it amounted to meaningful or substantive conversation about the project and its impacts on rights. The court quashed Ontario’s decision to approve the quarry, sending it back for proper consultation.

In deciding if there has been enough consultation, the court will look at what is called the “consultation record.” This is a record of all the correspondence and meetings that happened. Usually, the court will look only at the Crown’s version

of the consultation record, but there are exceptions.⁶¹

Part of what helped SON win the case is that over the five years of back-and-forth, they had sent letters setting out their rights and interests and asking for a meaningful consultation process. SON also asked for funding to engage experts. At various times Ontario promised a consultation process and also some funding, but never delivered.

Through their letters and meeting notes, SON had developed a written consultation record showing that SON had tried to engage with the Crown and made reasonable requests over five years for a fair and clear consultation process, but the Crown did not ever fulfill its duty to consult.

⁶⁰ [Saugeen First Nation and Chippewas of Nawash Unceded First Nation v Ontario \(MNR\), 2017 ONSC 3456.](#)

⁶¹ [Pimicikamak v Manitoba, 2018 MBCA 49.](#)

SECTION 3

Advancing Indigenous Jurisdiction by Participating in EAs

How Jurisdiction over EAs is Divided Between Federal and Provincial Governments and First Nations

Given Canada's constitution, outside of reserve lands,⁶² the federal government is responsible for reviewing some projects and Ontario is responsible for others. The Canadian *Impact Assessment Act* and Ontario's *Environmental Assessment Act* set out which types of projects each will review. Canada reviews certain mines, oil facilities, bridges, some roads and some dams, but this list is subject to change.⁶³ Ontario reviews electricity

projects, certain mines, forestry, municipal infrastructure projects, waste management, transit, and transportation projects. Some projects, such as certain mines and nuclear projects, will be reviewed by both Canada and Ontario.

To determine which level of government will review a given project off-reserve, look at Canada's and Ontario's regulations to see if a project falls within that government's jurisdiction.

For projects on-reserve, Canada and a First Nation may share jurisdiction

depending on the project and the laws applicable on the particular reserve. For example, if a First Nation has a Land Code under the *First Nations Land Management Act*, the First Nation may enact its own EA law that will apply to projects on its reserve. Note that if a project is both on and off reserve, there will likely be mixed requirements for the EA. The off-reserve portion of the project may be reviewed by Ontario and/or Canada, whereas the on-reserve portion may have different requirements. For example, the Henvey Inlet Wind Transmission Line Project included the

⁶² In this Toolkit, "reserve" has the same definition as it is defined in [s. 2\(1\)](#) of the [Indian Act](#), RSC 1985 c I-5, being "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."

⁶³ The recent reference before the Supreme Court of Canada regarding the *Impact Assessment Act* could change the types of projects that will be reviewable by the federal government: see Reference re [Impact Assessment Act](#), 2023 SCC 23.

construction of a transmission line both off-reserve and crossing Shawanaga First Nation's reserve. The portion of the transmission line off-reserve underwent an EA under Ontario law. The portion of the transmission line crossing Shawanaga First Nation's reserve underwent an EA led by Shawanaga First Nation pursuant to the *First Nations Land Management Act*.⁶⁴

Some Indigenous governments also have jurisdiction over EAs for projects in their territory through treaties or agreements with the federal and provincial/territorial governments. For example, in the Northwest Territories, the Inuvialuit, Sahtu Dene First Nations, Gwich'in and Tłıchǫ all have final agreements with Canada and the Northwest Territories that give them seats on review boards that review development in their territory.

But a First Nation does not need to have an agreement with Canada or the province/territory to conduct an EA for a project proposed in the First Nation's traditional territory. There are examples from across Canada of **First Nations asserting that jurisdiction and not waiting for approval from the federal or provincial government**. As explored in Section 1 of this Module on UNDRIP, Słkwx wú7mesh Úxwumixw (Squamish

Nation) created their own impact review process for a liquefied natural gas project proposed in their traditional territory in British Columbia. Squamish Nation did not wait for British Columbia and Canada to agree to their process or give it validity. Instead, Squamish Nation went directly to the proponent and got the proponent to agree to the process.⁶⁵ In effect, Squamish Nation became a regulator of the proposed project, and the proponent agreed to the conditions that the Squamish Nation placed on the project as an outcome of their review process. First Nations can learn from the success of Squamish Nation and others, and look at the building blocks needed to build your own EA process for proposed projects in your traditional territory.

⁶⁴ Henvey Inlet Wind LP. Henvey Inlet wind transmission line: Shawanaga First Nation reserve land overview – Determination of environmental effects. June 2017. <https://shawanagafirstnation.ca/wp-content/uploads/2017/08/Overview-Determination-of-Environmental-Effects.pdf>

⁶⁵ This case study was explained in Papillon M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335.

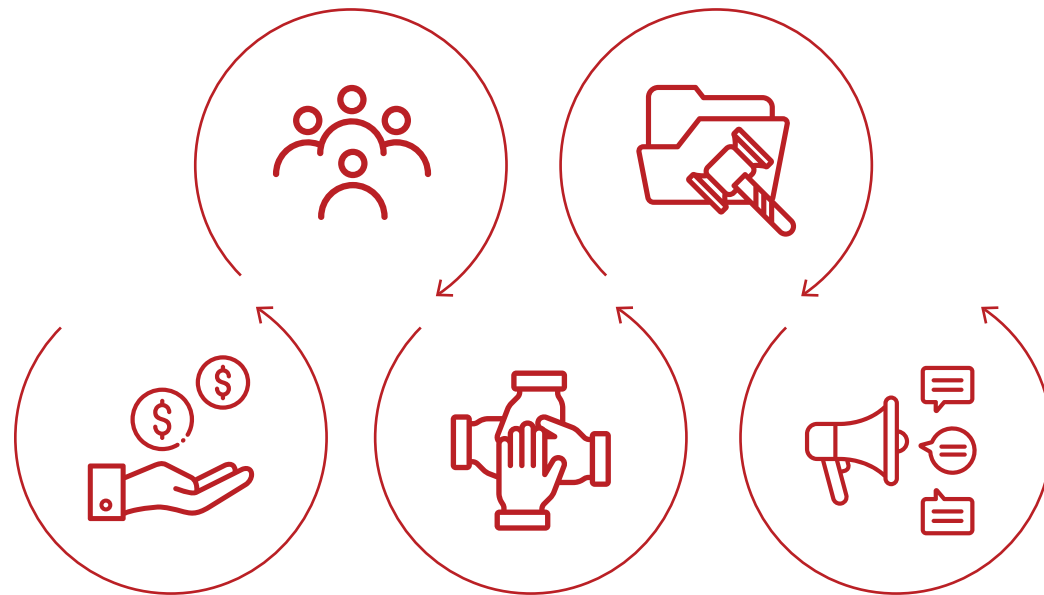
Building Blocks for Creating Your Own Enforceable EA Process

Strong Team

Need skilled **lawyers, negotiators, technical experts, IK experts, staff and leaders** to do the work

Legal Case

Need **legal uncertainty** by building a strong legal case for why a project should not go ahead without your consent



Financial Capacity

Need **significant funding** (internally or externally sourced) for all of the building blocks

Partnerships

Consider **partnering with neighbouring First Nations** to share the costs, contribute to the team, and add strength to political and legal uncertainty

Advocacy

Create **political uncertainty** by showing that the public will not support the project without your consent through public campaigns, direct action, and negotiation

EAs and the Duty to Consult and Accommodate

To fulfill its duty to consult, the Crown can rely on:

- the information gathered during the EA process;
- the opportunities that First Nations had to participate in the EA process; and
- the terms and conditions imposed as part of the EA decision.⁶⁶

But the Crown must maintain oversight to make sure that the duty is met.⁶⁷

Practically, what this means is that for most projects, the **EA process is a key part of the Crown's consultation process with First Nations.**

If Canada or Ontario decide that there will be **no EA for a proposed project** in a First Nation's traditional territory, that is not the end of the story. **First Nations can still demand that the Crown consult with the First Nation about the project and accommodate the First Nation's rights and interests** regardless of whether or not there is an EA. **The tools and tips in this Module may be useful for First Nations even if there is no formal EA for a project.**

⁶⁶ [Tsleil-Waututh Nation v Canada](#), 2018 FCA 153 at para 517, 548-549, 753-763.

⁶⁷ [Michipicoten First Nation v Ontario \(Minister of Natural Resources and Forests\)](#), 2016 ONSC 6899 at para 86.

Opportunities and Challenges at Each Step in the EA

While EAs differ in breadth and scope, in general, **all EAs follow five steps:**

1. Determine if an EA is required
2. Scope the EA
3. Conduct the EA
4. EA decision
5. Follow-up

Throughout the EA process, First Nations may face both opportunities and challenges.

Environmental Assessments Opportunities & Challenges

✓ Opportunities



Prepare own studies and collect IK to inform EA



Hire technical advisors to critique proponent studies



Co-draft parts of the EA report and conditions



Input on mitigation measures



Funding to participate in the process and do studies



Add enforceable conditions to make sure monitoring happens



If done well, can lead to consent

✗ Challenges



Tight timelines



Western science focused



Expensive and time consuming to participate



Adversarial process



Based on guesses



EA may not look at all related parts of project



Follow-up and monitoring difficult without agreement

STEP 1 Is an EA Required?

Most EAs start with an application from a proponent to a government permitting agency. Once the application has been received, the first step is for the government to decide if an EA is required.

Ontario and Canada have regulations and policies that guide this decision. Some types of projects never require an EA, while others will require them if they meet certain thresholds. For example, an electricity transmission project of a certain size may trigger an EA, while small projects will not be reviewed. You should look up the latest rules on the federal and Ontario EA websites.

Opportunities at this Step

- **Notify the Crown, EA decision maker** (if different from the body conducting the Crown consultation) **and proponent** that you have **rights and land uses in the area of the project that may be impacted** if the project goes ahead.
- Review the federal or Ontario EA rules for the type of project, determine what type of EA may be possible and ask the government to require the most **in-depth EA possible**.

- Discuss with the Crown and **EA decision maker** (if different from the body conducting the Crown consultation) **how you will be involved in the EA process** going forward and how the duty to consult and accommodate will be fulfilled. Sometimes the EA and consultation processes are combined into one, and other times they are kept as separate but overlapping processes. There may be a formal application process where you will need to apply to be an Intervenor or Participant in the EA. There are usually time limits to apply, so ensure that you have a staff or advisor tasked with watching for application deadlines related to EAs so you do not miss anything.
- Send the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent any **consultation or engagement protocols, Traditional Knowledge protocols and shareable Indigenous laws** that you have, in order to inform the EA process.
- Notify the Crown and EA decision maker (if different from the body conducting the Crown consultation) of **your expectation to engage in a meaningful consultation process** related to the project and your expectation that the project will be approved only with your **free, prior and informed consent**.

- Ask the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent for **funding to support your participation in the EA process**, including funding so that you can hire advisors and experts, and funding to conduct further studies such as Traditional Knowledge studies. There may be funding application deadlines so, again, it is a good practice to assign a staff member or advisor to keep track of EA-related deadlines.
- **Reach out to the proponent** to discuss the project, your rights, and the process going forward to review the impacts of the project.
- **Gather your team of experts, advisors, staff and political representatives** (see the section Gathering Your Team).

Challenges at this Step

- Throughout the EA process, **you may not get adequate funding** for you to participate fully.
- At this stage and throughout the process, **First Nations may be stretched to fully participate**. Depending on how many projects are going on in your territory, you may struggle with having enough human resources to devote time to participating in all consultations. This is why funding and gathering a good support team are so important.

- The federal and provincial/territorial laws may not require an EA, or the EA decision maker may decide one is not needed for the particular project. Remember that an EA is just one way in which the Crown discharges its duty to consult and accommodate you. If there is no EA, the Crown still needs to consult meaningfully with you about the project through another process if the project may adversely impact your rights. **It is important to put the Crown on notice that if there is no EA, you have a right to be, and expect to be, meaningfully consulted.**
- **EAs have tight timelines at each stage** and it can be difficult to participate meaningfully under those timelines. For example, you may only be given a month to comment on an initial project description and provide input for why an EA is needed. To get the most out of an EA, you should try to do as much preparation work as possible before the EA starts, for example by gathering previously collected Traditional Knowledge (maps, study reports, etc.). This will require that you are aware of proposed projects before they get to the EA stage. If you have the resources, it can be helpful to assign staff to the job of monitoring for upcoming projects so that you are prepared. However, without adequate funding or resources, this is difficult.

STEP 2 Scope the EA

Once it has been decided that an EA is required, the applicable legislation will set out the scope of the EA, or the EA decision maker will “scope” the EA. If the EA decision maker scopes the EA, this means that they will decide:

- The **scope of the project**
 - » What parts of the project are going to be looked at during the EA?
 - » The principal project (e.g., a mine) will obviously be included. But what about additional projects, such as access roads, worker accommodations, etc.?
- The **scope of the EA**
 - » What factors will be looked at during the EA? Some of the common factors are:
 - environmental effects,
 - impacts on traditional uses,
 - cumulative effects,
 - health,
 - cultural and socio-economic factors,
 - mitigation measures,
 - alternatives to the project,
 - project purpose, and
 - significance of environmental effects.
 - » What type of EA will be done? Will there be a public hearing? (Canada and Ontario each have different levels of EA they can do; see their websites

for the latest information on the options for an EA.)

- The **scope of the factors** to be considered during the EA
 - » For each factor to be considered during the EA, what will be examined?
 - » What geographic area will be included?
 - » Which species will be looked at?
 - » What water parameters will be assessed?

The EA decision maker may prepare or approve a scoping document that sets out what the EA will examine. This document has different names under different legislation. For example, it may be called Terms of Reference or Tailored Impact Statement Guidelines. The proponent will have a role in preparing the scoping document, but **you should be given an opportunity to comment on the scoping document** for the EA before the EA decision maker finalizes the scope of the EA. It is key that you are involved in scoping the EA so you can ensure that all issues of importance to you are included.

Opportunities at this Step

- Notify the EA decision maker of your expectation to be involved in developing the scope of the EA.
- **Engage with your community to gather Traditional Knowledge and input**

on issues of importance for the EA.

Develop your own Traditional Knowledge protocol or process to enable you to share relevant Traditional Knowledge with the EA decision maker and proponent, as well as ensure the protection of your knowledge.

- **Engage your own experts and advisors** to help prepare your input on the scoping document.
- Provide the EA decision maker with your **comments on the issues that should be looked at during the EA and the parameters for the scope.**
- Identify what **studies you want to undertake** during the EA and ask the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent to fund the studies. Request that the scoping document require that the results of your studies be considered and incorporated into the EA.

Challenges at this Step

- There is no guarantee that the EA decision maker will listen to you when scoping the EA, and they **may leave out aspects of the project** or parameters that you think are important. If this happens, you may be able to judicially review the scoping decision.⁶⁸ You may also be able to demand that

the Crown consult with you separately on those issues not included in the EA.

- The federal and Ontario governments have laws and policies that guide what level of EA is required for a particular type of project. **If the project does not trigger a larger scoped EA, you may face a challenge convincing the government to bump the project up to a fuller review.**
- The federal or Ontario government may rely on the **proponent to prepare the initial scoping document** for the EA, which may make it more difficult for you to influence the contents of the scoping document.
- The EA decision maker may not require the level of EA you want. Remember that an EA is just one way in which the Crown discharges its duty to consult and accommodate you. If there is no EA or the EA is not comprehensive enough, the Crown still needs to consult meaningfully with you about the project through another process. **It is important to put the Crown on notice that if there is no EA or the EA is not comprehensive enough, you still have the right to consultation, and expect to be meaningfully consulted.**

STEP 3

Conduct the EA

During the EA process, the EA decision maker will gather various types of information to assess the project, including:

- a project description;
- the purpose of the project;
- an identification of alternative means of carrying out the project;
- alternatives to the project;
- an environmental baseline description;
- an impact analysis of the project;
- a cumulative effects assessment;
- an identification of ways to mitigate the adverse impacts;
- an identification of residual impacts; and
- a determination of significance of the residual impacts.

Information will be gathered from the proponent, the public, other government agencies, the EA decision maker's own experts, and impacted First Nations. This information may be gathered during a public hearing or through written submissions and meetings held during the EA process.

The EA decision maker will then use various analysis methods to **evaluate the**

⁶⁸ [Tsilil-Waututh v Canada \(Attorney General\)](#), 2018 FCA 153 at paras 5, 87, 409.

impacts of the project based on the information gathered. Once the impacts have been assessed, the next step is to **identify and evaluate ways to avoid or mitigate those impacts**. The EA decision maker will decide which impacts cannot be fully avoided or mitigated, and those are considered the **residual impacts**. The residual impacts are the impacts that the project will cause.

Opportunities at this Step

- Participate in the EA process.
- First Nations can submit their own studies to add to the information considered in the EA, such as Land Use and Occupancy Studies, Traditional Knowledge, and your own western science studies and technical reviews.
- First Nations can insist that the EA process include meetings held locally and in their own language. For example, for the Hammond Reef Gold Project, the proponent and some of the impacted First Nations organized Elders' forums with interpreters to discuss the project.⁶⁹
- Demand **funding** from the Crown, EA decision maker (if different from the body conducting the Crown consultation) and proponent to participate fully in the EA process, including funding for your own scientific experts; for gather-

ing, presenting and protecting Traditional Knowledge; for conducting your own studies; for advisors; and for community engagement.

Challenges at this Step

- EAs are an **adversarial process**, which may not be how you like to interact.
- **Western science usually dominates** at an EA. It is useful to hire your own western scientists to review and critique the proponent's and government body's science reports, and to advise you on that science.
- EA decision makers are including Traditional Knowledge in EAs more often now than in the past, but they do not always give Traditional Knowledge the same weight as western science.⁷⁰ This is something you will need to work against during the EA process, and advocate for your knowledge to be considered and incorporated into the decision. Ask the EA decision maker to show you how they have included Traditional Knowledge in their decision making. (See the Traditional Knowledge Module for more

on how to gather, use and safeguard your Traditional Knowledge.)

STEP 4 EA Decision

The next step is for the EA decision maker to decide **if the project should be allowed to go ahead and what terms and conditions, if any, should apply to the approval**.

To make that decision, the EA decision maker will assess the **significance of the residual impacts**. This is a judgement about whether or not the impact is acceptable or unacceptable.

Different EA decision makers have their own ways of deciding the significance of a residual impact. But some of the **criteria used to assess significance** include:

- regulatory standards for environmental conditions (for example, clean air and water quality standards);
- statistical tests;
- level of public concern;
- scientific and professional judgement;

⁶⁹ Canadian Environmental Assessment Agency. 2019. *Hammond Reef Project comprehensive study report*, at pp 8, 113, 140. <https://iaac-aeic.gc.ca/050/documents/p63174/123876E.pdf>

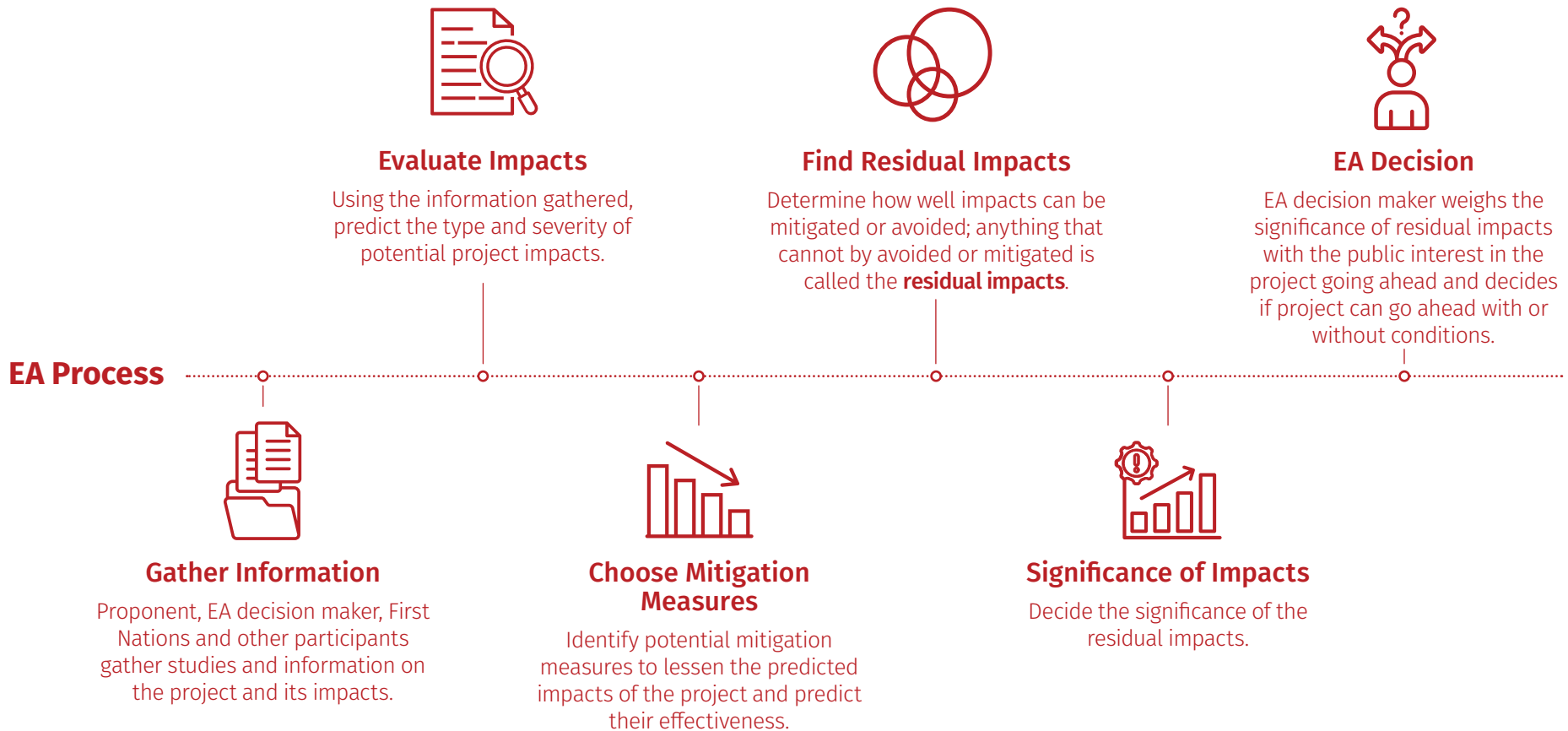
⁷⁰ Sallenave, J. Undated. Giving traditional ecological knowledge its rightful place in environmental impact assessment. Indigenous Centre for Cumulative Effects, at 5-6. <https://www.icce-caec.ca/knowledge-centre/giving-traditional-ecological-knowledge-its-rightful-place-in-environmental-impact-assessment/>

- Traditional Knowledge;
- disturbance or disruption of valued ecosystem components; and
- degree of negative impact on social values and quality of life.

The factors that the EA decision maker can take into account when making the

EA decision vary (see the latest federal and Ontario EA laws). In general, the EA decision maker needs to decide if the project should go ahead by **weighing the significance of the residual impacts of the project versus the public interest in the project going ahead.**

First Nations are encouraged to push EA decision makers to fully consider Traditional Knowledge alongside scientific knowledge, and to identify where and how Traditional Knowledge was included in the EA decision maker's analysis.



Opportunities at this Step

- If given the opportunity, **comment on the draft EA decision**. Rely on your legal and technical advisors to help you prepare your comments. Engage with your community and Traditional Knowledge holders to obtain community input too.
- In some cases, **First Nations may be able to participate in the decision making for all or part of the EA**. Under the federal *Impact Assessment Act*, there are ways in which First Nations may be able to formally collaborate or partner on the EA, if the project is taking place on reserve. First Nations could enter into agreements with the federal Impact Assessment Agency to lead studies and co-draft parts of the assessment report. There are also opportunities for some First Nations to partner on the EA by contributing to results of the EA, including under your own Indigenous laws or protocols. The federal *Impact Assessment Act* also allows Canada to enter into co-operation agreements with First Nations that enable the First Nation to exercise powers and duties under the *Impact Assessment Act* for projects taking place on reserve.
- Many First Nations have been able to get agreements to co-draft portions of

the EA decision. For example, for the Blackwater Gold Project in British Columbia, two of the impacted First Nations, the Lhoosk'uz Dené Nation and the Ulkatcho First Nation, entered into an Memorandum of Understanding (MOU) with Canada and British Columbia for the EA, and the parties agreed that they would try to reach consensus on measures needed to address potential adverse effects on Aboriginal and treaty rights. The First Nations were also allowed to co-draft sections of the EA decision and were members of a working group (along with Canada, British Columbia and local municipalities) that gave advice on the drafting of the decision.⁷¹

- Seek clarification on how the decision was made. Insist that the decision be clear and transparent. How were your rights considered? How was your Traditional Knowledge used, or not used? Were your technical comments addressed? If not, why not?
- Once a final decision is made, review the EA decision right away. If you are unhappy with the decision, you will need to act quickly to challenge the

decision – most likely through a **judicial review**. This means that you will apply to the court to review the government decision maker's decision, and the court has rules on how quickly you need to file an application. You should seek legal advice about your rights and your particular situation whenever you are considering bringing an application in court.

- If you are unhappy with the results of the EA and question whether your interests and concerns have been sufficiently considered through consultation and accommodation, **push the Crown for further meaningful consultation and accommodation before the project is approved**.

Challenges at this Step

- First Nations may not be given the opportunity to participate in the drafting of the EA decision or to participate in the decision-making process.
- Your rights and knowledge may not be adequately considered in the final decision.

⁷¹ Keefer Ecological Services Ltd. 2019. *Assessment of impacts on the Lhooskuz Dené Nation and Ulkatcho First Nations' Aboriginal title, rights, and interests from the Blackwater Gold Project*. <https://ceaa-acee.gc.ca/050/documents/p80017/130537E.pdf>; Canadian Environmental Assessment Agency. 2019. *Blackwater Gold Project environmental assessment report*. <https://ceaa-acee.gc.ca/050/documents/p80017/129204E.pdf> at pp. iv, 3 and 154-162

What to Do if You are Unhappy with an EA Decision



Ask the Crown for more consultation outside of the EA process



Negotiate with the proponent for an agreement related to the project to address impacts outside of the EA



Judicially review the EA decision in court (you may also need to apply for an injunction to stop the project while the case is heard)



Take direct action to convince the federal or Ontario government that there is not enough public support for the project

STEP 5 EA Decision

The EA decision should include an evaluation of **planned monitoring or follow-up programs**. The requirements for the follow-up program should be included in the terms and conditions for project approval.

Opportunities at this Step

- During the earlier EA phases, advocate for the EA decision to include **enforceable** and **measurable** mitigation measures and a public monitoring process. There needs to be a mechanism in place to monitor what the proponent does during the life of the project, measure if the mitigation measures are working as predicted, and deal with problems if they arise.
- Participate in the follow-up program.
- **Ensure that the relevant government bodies and the proponent are doing what is required under the agreed follow-up program.** If they do not do what is required, notify them. If they do not fix the problem, you may have other legal options under an agreement with the proponent (like an impact benefit agreement) or through a judicial review of the government action. You should seek legal advice about your rights and your particular

situation if you are considering a legal challenge.

Challenges at this Step

- It is key that proponents and relevant government bodies conduct **ongoing monitoring** of projects to assess the impacts of the project and see if mitigation measures are working as expected. If impacts are more than what was expected, your rights may be more adversely affected. So, it is important that there are mechanisms in place to require the proponent to change the mitigation measures if they do not work as expected. These mechanisms could be put into the **terms and conditions for the approval, or be part of an impact benefit agreement with the proponent.**
- It is important that First Nations, relevant government bodies and the proponent have strong communication mechanisms in place for the duration of the project; otherwise, follow-up and monitoring may not happen or you may not know what is happening.
- **Unless there are formal requirements for the proponent or relevant government body to continue to monitor and adapt, they may not do it.**

Checklist for Participating in an EA Process

STEP 1

Is an EA required?

- ✓ Notify government and proponent about your rights, knowledge, and interests that may be impacted by the project
- ✓ Review Canada and Ontario rules to see type of EA possible and advocate for the EA you want
- ✓ Send Canada /Ontario and proponent a copy of any consultation/engagement protocol, Indigenous laws and Indigenous knowledge protocol that is relevant to the EA
- ✓ Notify Canada/Ontario that you expect to engage in meaningful consultation re project and discuss how you will be involved in EA
- ✓ Reach out to the proponent to talk about the project, your rights and interests, your Indigenous knowledge, and the process going forward to review the impacts and get to consent
- ✓ Ask Canada/Ontario and the proponent for funding to support your participation in the EA

STEP 2

Scope the EA

- ✓ Notify the Crown that you want to be involved in scoping the EA and how you want to be involved in the EA process
- ✓ Provide comments on the EA scoping document
- ✓ Engage your own experts, advisors and Knowledge Holders to help you prepare your input on the scoping document

STEP 3

Conduct the EA

- ✓ Participate in the EA process by commenting on the proponent's submissions
- ✓ Prepare and submit your own studies about the impacts, including an Indigenous knowledge study
- ✓ Request that parts of the EA process happen in your community and in your language
- ✓ Demand funding to cover your costs of participating, including doing your studies

Checklist for Participating in an EA Process continued

STEP 4

EA Decision

- ✓ Participate in decision-making process
- ✓ Comment on the draft EA report if possible
- ✓ If the decision is not clear on how your Traditional Knowledge and input were considered, seek clarification and transparency in how decision was made and information relied upon
- ✓ If you are unhappy with the decision, consider if you want to judicially review the decision (challenge the decision in court). Note that there may be tight timelines to do this
- ✓ If you are unhappy with the consultation and accommodation that may have happened in the EA process, ask the Crown for more consultation outside the EA

STEP 5

Follow-up and Monitoring

- ✓ Participate in the follow-up program
- ✓ Make sure that the proponent and Crown are doing what they promised they would do. If they are not, look at your legal options to force them to do monitoring and respond to unexpected impacts
- ✓ If you have an IBA with the proponent, ensure that the proponent is following through on all of their promises

Gathering Your Team

In order to get the most out of the EA process, you will need a strong team of people to help you understand the impacts, and to advocate for your rights and consideration of your knowledge.

Some of the team members you may want:

- **Staff** who coordinate and oversee consultations and EA participation;
- **Legal advisors** to advise you on your rights, support negotiations, draft agreements and represent you in the EA process;
- **Western science technical advisors** (ecologists, aquatic biologists, archeologists, hydrogeologists, etc.) to review and critique the proponent's information and to prepare your own studies;
- **Political representation**, selected according to your Indigenous laws and protocols, to represent your government in negotiations, consultation processes and the EA process; and
- **Traditional Knowledge holders and experts** on gathering and presenting Traditional Knowledge.

The EA process can be proponent driven, meaning that the proponent prepares the studies. It is important that you also

prepare your own technical reviews and studies in order to be able to challenge the proponent's information, add to the EA analysis, and suggest mitigation measures. You may also need to gather information to support your claims that you have rights, knowledge and interests that may be adversely impacted by the project. Some of the work you should consider doing includes:

1. **Technical reviews** of proponent studies and government documents;
2. **Land use and occupancy study;**
3. **Gather and study Traditional Knowledge;**
4. **Cultural impact assessment;**
5. **Cumulative effects assessment;**
6. **Rights impact assessment;**
7. **Socio-economic study;**
8. **Archeological and heritage studies;**
9. **Health studies;**
10. **Harvest and food security studies;**
11. **Ecological studies;**

12. **Gender-based analysis plus (GBA+) on the impacts of the project;**

13. **Gather baseline data;** and

14. **Scope the issues of importance** to your First Nation.

You will need **funding to properly participate in the EA process** and to pay for your team and the necessary studies. The federal and Ontario governments may provide **participant funding**. You may also be able to get **funding from the proponent**. As discussed in Section 2 on the duty to consult and accommodate, in order for consultation to be meaningful, you must have the resources to participate and it is reasonable to take the position that the proponent or the Crown provide this funding.

If the Crown wants to use the EA process to discharge its duty to consult, the Crown must make sure that you have enough resources to fully participate in the EA process.

Equitable Participation in EA Processes

First Nations are often engaged in EA and in consultation through their leadership. It is important for First Nations to think about how to engage and consult with their members, ensuring that they are part of the process.

Indigenous women, girls and two-spirited people (“IWG2S”) need to be uniquely considered in EA processes. This unique consideration is important because IWG2S experience specific burdens from resource development. For example, the risk of violence toward IWG2S increases when large influxes of (mostly male) workers move in or near communities.⁷² The sudden influx of workers can also strain the local housing market, making it challenging for IWG2S to find affordable, or any, housing. The increasing unaffordability of housing and in-migration can also lead to an increased number of IWG2S being drawn into sex work. Sex work is associated with several health and safety risks, including increased rates of sexually transmitted infections (STIs) and violence. If IWG2S are unable to find housing, they become susceptible to other risk factors, such as mental and physical health impacts. Due to these risk factors, whether conducting your own EA, participating in a federal or pro-

vincial EA or partnering with a proponent to conduct an EA, it will be important for your First Nation to consider the impacts of a project on IWG2S.⁷³

First Nations can incorporate the concerns of IWG2S in the EA process by conducting a gender-based analysis plus (GBA+). GBA+ is an analytical tool used to assess systemic inequalities and to assess how different groups of people may experience policies, programs and initiatives. The “plus” in GBA+ acknowledges that GBA+ is not just about differences between biological (sexes) and socio-cultural (genders) considerations. GBA+ considers many other identity factors such as race, ethnicity, religion, age, and mental or physical disability, and how the interaction between these factors influences the way individuals might experience government policies and initiatives.⁷⁴

Your First Nation can bring GBA+ into the EA process by insisting that the

proponent or Crown fund a GBA+ for the project and also by including GBA+ into your studies and submissions for the EA so that these issues are heard and considered in the EA.

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- 72** Johnston, A. 2022. Gender-based analysis-plus in impact assessment: What it is, and why it is important (hint: it's not just about jobs). West Coast Environmental Law. <https://www.wcel.org/blog/gender-based-analysis-plus-in-impact-assessment-what-it-and-why-it-important-hint-its-not-just>
- 73** Zingel, A. 2019. Study gendered impacts of resource development: MMIWG inquiry. *CBC Online*. <https://www.cbc.ca/news/canada/north/gendered-impacts-resource-extraction-mmiwg-1.5195580>
- 74** Government of Canada. 2021. What is gender-based analysis plus. <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html>

Best Practices for Including Gender-based Analysis & in EA



First Nation is doing own EA

Involve IWG2S in revitalizing Indigenous laws (role as historians, focus groups, researchers)

Consider IWG2S when revitalizing Indigenous laws (what are our laws that protect IWG2S? What is the role of IWG2S in decision making?)

When conducting your EA, ask how the project may impact rights practised by IWG2S

When conducting your EA, ask how the project may impact the physical, mental, emotional and spiritual health of IWG2S



Participating in federal/provincial EA

Ask the Crown and proponent for funding for a GBA+

Ask your team of experts and advisors to include an analysis of how the project may impact IWG2S in particular in your materials for the EA

When commenting on EA documents, include comments on the particular impacts of the project on the rights practised and interests of IWG2S

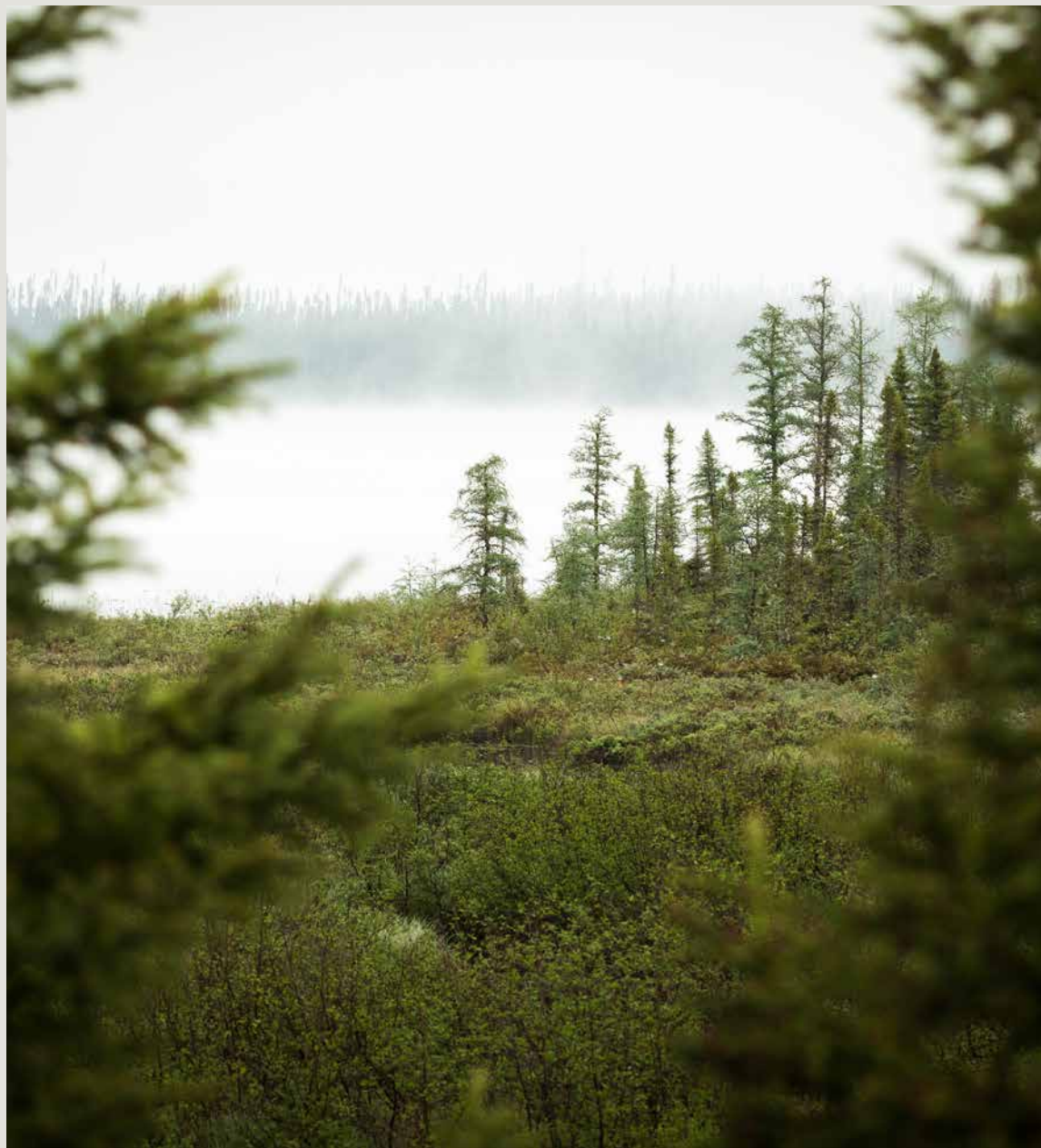
Ensure that follow-up and monitoring include specific monitoring for the unique impacts on the rights and interests of IWG2S

REFERENCES

See the References & Resources Module for a full list of references to this section.

Traditional Knowledge and Environmental Assessments Module

02



AT A GLANCE

What is in the Traditional Knowledge and Environmental Assessments Module

This Module assists in decision making regarding a determination of if and under what conditions Traditional Knowledge (TK) should be shared as part of a public impact assessment process. This module emphasizes self-determination and governance over your own knowledge. You are caretakers of the knowledge that has been passed on from generation to generation to support the well-being of your Nation, your community and future generations. It is important to employ strategies to ensure you maintain sovereignty over your own knowledge, data, information, maps, etc. that will be generated from your participation in impact assessment processes. The impact assessment is a public process, which means the information generated from it becomes accessible to the public, proponents, governments and others. It is advisable to be cautious when deliberating about what knowledge you will share, when it will be shared, and under what conditions.

The first part of this Module is focused on assisting you in conceptualizing TK on your own terms and assessing the value of sharing your knowledge for the purposes of an environmental assessment (EA). This section offers key considerations to assist with your decision to share and/or protect TK based on a risk assessment.

The second part of this Module guides you through a flexible process for leading and con-

ducting your own TK study. It is important to maintain authority and jurisdiction over your own knowledge, just as you do of your lands and territories.

The third part of the Module assists you with developing your own TK protocol to guide decision making. First Nations are increasingly developing their TK policies, protocols and guidelines to assist them in maintaining governance and management over their own knowledge. These guidelines are intended to not only protect your knowledge but your knowledge holders. This TK Module includes the following topics:

- Considerations in Indigenous/Traditional Knowledge and EAs;
- Conducting an Indigenous/Traditional study for the purposes of EAs; and
- Developing your own TK protocol.

Introduction

For thousands of years, Indigenous Peoples all over the world developed complex and sophisticated knowledge systems that facilitated sustainable relationships with the environment and natural world. While Indigenous nations are highly diverse, they share certain common philosophical foundations. Integral to Traditional Knowledge (TK) – often referred to as Indigenous Knowledge – is a responsibility to maintain and enhance relationships with the natural world to support the continuance of all life. A foundational core of TK is spirituality. Spirit and ceremony are not “add ons” to the “real” knowledge, but lay the groundwork for appropriate, responsible and reciprocal obligations with the natural world. Another aspect of TK that requires the utmost respect is the recognition that TK is long-standing knowledge and can stand on its own – as it always has – to inform and guide environmental decision making.

TK has existed, been transformed and been practised for countless generations,

and is certainly not new. What *is* new is the interest in and recognition of these systems by governments, proponents, academics, environmental non-governmental organizations (ENGOS) and others. This interest has emerged in part due to recognition of the fact that western science and technology alone has been unable to effectively address global, regional and local environmental challenges. Canada’s interest and recognition is more recent, and TK has found expression in environmental legislation. More importantly, Indigenous Peoples themselves have been calling for the recognition of TK in the decision-making processes that affect their lives, lands and waters.

It is essential that governments and project proponents understand and are open to learning from Indigenous Peoples about history, treaties, worldview and philosophies, as well as the ongoing policy and practice of colonialism and its continued impacts on Indigenous societies and communities. It is inappropriate,

Terminology

This Toolkit primarily utilizes the term *Traditional Knowledge* (TK), although other terms are regarded as acceptable in the EA context. “Traditional Knowledge” is the term utilized in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). “Indigenous Knowledge” is the term now utilized in the federal *Impact Assessment Act* as well as other federal legislation (e.g., *Fisheries Act*). Some First Nations prefer to use the term “Traditional Ecological Knowledge” or “Ancestral Knowledge.” It is important to utilize whichever term the First Nation feels best expresses their knowledge.

unreasonable and disrespectful to expect Indigenous Peoples to share knowledge with governments and project proponents who remain ignorant of the past and ongoing colonialism and the lived realities of Indigenous Peoples. Indigenous Peoples continue to emphasize the requirement for governments and project proponents to know and respect Indigenous Peoples' different nations and distinct histories.

TK has formed an integral role in understanding changes to the environment. For First Nation communities, TK continues to serve as an important basis to determine environmental impacts of particular activities, including both contemporary and traditional activities (hunting, fishing, gathering, etc.). Environmental assessment in the broadest sense is not new to First Nations. First Nations had their own ways of deciding which activities to proceed with or not proceed with, depending on each activity's impact on the natural world and well-being of future generations.

Over time, formalized, highly regulated processes for EAs have been introduced and applied by governments to First Nations and their territories. For decades, both federal and provincial governments have formulated impact assessment processes through regulatory decision

More on Terminology

The term “Indigenous Peoples” has been defined as follows by the Office of the United Nations High Commissioner for Human Rights: “Indigenous peoples live on all continents, from the Arctic to the Pacific, via Asia, Africa and the Americas. There is no singularly authoritative definition of indigenous peoples under international law and policy, and the Indigenous Declaration does not set out any definition. This decision was taken intentionally by the drafters based on the rationale that the identification of an indigenous people is the right of the people itself – the right of self-identification – and a fundamental element of the right to self-determination. Indigenous peoples’ situations and contexts are highly variable.” (United Nations Office of Human Rights, 2023; <https://www.ohchr.org/en/indigenous-peoples/about-indigenous-peoples-and-human-rights>).

In the Canadian context, the term “Indigenous Peoples” has come to replace the constitutionally recognized term “Aboriginal Peoples,” particularly since the *United Nations Declaration on the Rights of Indigenous Peoples* was accepted. See <https://www.ohchr.org/en/indigenous-peoples/about-indigenous-peoples-and-human-rights>.

For the purposes of this Toolkit, the term “Indigenous Peoples” will be used generally when referring to legislation (e.g., *Impact Assessment Act*), the literature or broader policy initiatives (e.g., *Indigenous Knowledge Policy Framework*). However, this Toolkit is intended for and designed for First Nations.

making and project reviews. It should be noted that various jurisdictions have different impact assessment legislation and processes. These often change over time

due to politics, change in governments, industry advocacy and advancement of Indigenous rights through court decisions.

First Nations have experienced massive social, political, cultural, legal, environmental and spiritual upheaval due to historical and ongoing colonial processes. Over the centuries, First Nations have sought to protect their way of life, lands/environment and lives through various means. First Nations continue to experience violation of their human rights, as evidenced through the ongoing water, housing and child welfare crises in many communities. First Nations continually seek avenues to continue to protect their way of life, future generations and the environment. EAs are one such avenue, and over the decades First Nations have strongly advocated for robust EA processes that respect constitutionally protected rights, TK and protection of the environment. First Nations also participate in these broader EA processes so that their views will be considered in decisions that will affect their lives, livelihoods, lands and future generations.

This Module provides advice on how TK can be considered in these broader, external EA processes on your terms and to your benefit. If your community has chosen to engage in an EA process, it may be important to include aspects of TK. The Module discusses the following topics:

- What is TK?
- Importance of language;
- Ways of sharing and protecting TK outside the community;
- TK decision making and governance;
- The rights and value of TK;
- Why use TK in an EA;
- Risk assessment;
- Protecting TK in EAs;
- Considerations in conducting a TK study;
- Legal and policy considerations;
- Using existing information for a TK study;
- Gathering new information for a TK study;
- Funding sources; and
- Benefits of conducting a TK study.

The ideal situation is that you **govern your own knowledge and decide** what TK you wish to share under what circumstances. TK has been utilized by your community and nation for countless generations; the process for sharing with external interests (governments, proponents, academics) is only recently being formalized in First Nation-led **TK protocols**. These protocols facilitate the governance of your knowledge in situations when external interests request it.

The purpose of this Module is to ensure you can make informed decisions about

your own knowledge when external interests request or seek it. It is much better to be prepared and to respond in the way you would like rather than react or find yourself scrambling to meet unreasonable deadlines. This Module will also include guidance for how to develop your own TK protocol. It is important to realize that, although environmental impact assessment is a highly regulated process by federal, provincial and territorial governments, the TK aspects of environmental assessment are under the control of your community. TK comes from your community. You decide what will be shared, who will share it and when.

Guidance provided in this chapter can be applied to decisions regarding sharing TK with governments, proponents or any external interest seeking your knowledge.

What is TK?

“Traditional Knowledge” (TK) is used in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). It is knowledge that is an integral, inseparable feature of Indigenous societies. It is important to define what you and your community mean by TK. Terminology evolves over time. First Nations across the province define TK in many different ways. Many

First Nations have their own concepts of TK that do not necessarily conform to academic, legislative or policy definitions. Some communities have indicated that community or ancestral knowledge is also TK. Other communities choose to define TK more narrowly. Some communities may choose to use different TK terminology altogether. For example, the Mohawks of Akwesasne use the term “Naturalized Knowledge System” to emphasize that

knowledge systems of Indigenous people are not homogeneous. Other First Nation communities may be comfortable with the term “Aboriginal Traditional Knowledge” (ATK), as referred to in the *Species At Risk Act* (SARA 2002) legislation. In 2006, the Chiefs of Ontario used the term “Aboriginal Traditional Knowledge,” and in later years used “Traditional Knowledge.” For many years, the term “Traditional Ecological Knowledge” (TEK) was used.

The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments define TK as follows:

Traditional knowledge – refers to the traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

Source: Secretariat of the Convention on Biological Diversity, 2004. <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

The United Nations Declaration on the Rights of Indigenous Peoples refers to TK in Article 31:

- 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.**
 - 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.**
-

“Indigenous Knowledge” (IK) has gained general acceptance; it is defined as “the Indigenous knowledge of the Indigenous peoples of Canada” in the *Impact Assessment Act* (sec 2, 2019). Governments, proponents and other non-Indigenous agencies use the term “Indigenous Knowledge” but they are generally referring to a much more limited concept.

It is not appropriate to impose a definition of TK on First Nation communities. It is reasonable to expect proponents, governments and others involved in an EA process to respect the decision and preferences of a given community.

It is very important for each First Nation community to develop your own view/concept of what Indigenous or traditional knowledge means in your community. Your definition helps set the limits of what you are willing to share externally and what knowledge remains in the community. In recent years, some First Nations have decided to use their own ancestral language in expressing their knowledge.

There are many descriptions of TK based on international agreements, scholars, scientists, governments, agencies and Indigenous organizations. In this document, we will use the term TK, while recognizing it is by no means a perfect term, nor accept-

In a project with the Chiefs of Ontario related to water, Elders involved in the project were asked to describe “traditional knowledge.” The following is their brief description:

Aboriginal Traditional Knowledge includes the rules and guidelines passed down through generations that guide us in our behavior in relation to the land, to the animals and to each other (p. 14).

Source: Lavalley, Giselle. 2006. *Aboriginal Traditional Knowledge and Source Water Protection: First Nations’ Views on Taking Care of Water*. Toronto: Chiefs of Ontario.

able to all First Nations (as noted above). First Nations should decide which term and definitions they are comfortable using.

Importance of Language

First Nations continue to emphasize the importance of language in generating, innovating and sharing TK. The Arctic Council Permanent Participants for

Use in the Arctic developed the *Ottawa Traditional Knowledge Principles*. These principles emphasize the relationships between TK and languages, and defines TK as follows:

Traditional Knowledge is a systematic way of thinking and knowing that is elaborated and applied to phenomena across biological, physical, cultural and linguistic systems. Traditional Knowledge is owned by the holders of that knowledge, often collectively, and is *uniquely expressed and transmitted through indigenous languages*. It is a body of knowledge generated through cultural practices, lived experiences including extensive and multigenerational observations, lessons and skills. It has been developed and verified over millennia and is still developing in a living process, including knowledge acquired today and in the future, and it is passed on from generation to generation. (Arctic Council, undated; https://static1.squarespace.com/static/58b6de9e414fb54d6c50134e/t/5dd4097576d4226b2a894337/1574177142813/Ottawa_TK_Principles.pdf).

Support for language revitalization and retention is thus critical for the maintenance and sharing of TK.

It is also important to consider ways in which TK will be shared in your community. The Chiefs of Ontario prepared a TK primer and has offered the following ideas for your consideration.

Ways of Sharing and Protecting TK Outside the Community

It is important to determine what you mean by “community” and to be aware that “First Nation” often means “beyond the reserve” boundary in terms of lands/

The Canadian Encyclopedia defines Indigenous territory as “Indigenous territory – also referred to as traditional territory – describes the ancestral and contemporary connections of [Indigenous peoples](#) to a geographical area. Territories may be defined by kinship ties, occupation, seasonal travel routes, trade networks, management of resources, and cultural and linguistic connections to place.”

Source: <https://www.thecanadianencyclopedia.ca/en/article/indigenous-territory>.

Ways of Sharing and Protecting TK in the Community

The development and implementation of protocols to share and protect TK within First Nation communities is a priority. We are aware of the historical impact of colonization and our communities need to be pro-active by reconnecting and taking up our responsibility to adapt to the changes and move forward in protecting our future. TK promotes balance and harmony; this harmony includes integrating TK and practices of western society. What our ancestors have passed down to this generation will still work today, and in the future.

The following are examples of sharing and protecting TK in the community:

- Education on the role of TK in the community.
- Community programs that promote TK sharing and protection, [e.g.,] TK apprenticeship programs, language programs.
- Leadership to listen to the Elders.
- Sharing stories and knowledge with each other in the community, [e.g.,] Elders, Band Council, community members, health staff.
- Understand the role of TK in protecting the land for future generations.
- Children need to receive teachings, [e.g.,] school visits.
- Community promotion of ceremonies, [e.g.,] fasts, etc.
- Younger generations must learn their inherent rights and treaty rights.
- Incorporate TK in the community decision-making process and governance.
- Communities must work together to protect their TK.

Source: Chiefs of Ontario. 2010. *Traditional Knowledge Primer*. Toronto: Chiefs of Ontario.

territories and resources. First Nations are specific legal entities defined and governed by the *Indian Act* (1876). Jurisdiction is determined by the *Constitution Act* (1982). Often the term “community” is used synonymously with First Nation (or bands or reserves).

The *Indian Act* does not govern all First Nations; some have opted for various other negotiated agreements, such as self-government agreements. Some First Nations have also maintained their traditional governments over time, and continue to assert authority and jurisdiction through these governments. It is important to consider who or what the decision-making authority will be for your EA and TK study.

Protection of Indigenous/Traditional Knowledge

Although treaties outline the relationships between communities (nations) and Canada (nation), further rights to protect TK are required to limit First Nations’ cultural erosion and economic exploitation. First Nation communities also require the opportunity to proactively respond: this includes working in collaboration with governments on a nation-to-nation basis. Developing TK processes that include intellectual property rights is one step toward ensuring TK sustainability.

In addition, the Chiefs of Ontario suggested other ways to share and protect TK outside the community:

- **First Nations TK holders’ inclusion in external decision-making processes;**
- **Equal recognition of TK to western science;**
- **Positive working relationships with non-Aboriginal people;**
- **Education to encourage non-Aboriginal people to see and work with the natural world from a TK perspective;**
- **First Nation consultation on issues affecting their communities;**
- **First Nations resources for accessing lawyers, engineers, scientists to assist them in full participation;**
- **First Nations approval on decisions that impact their communities;**
- **TK must be consistent in decision making;**
- **External decisions need to consider the long-term impacts and survival of the people;**
- **TK [is] not for sale;**
- **Much TK has been forgotten, so it must be protected;**
- **TK sharing of what is relevant, not ‘everything’; and**
- **TK must be shared directly, not someone else conveying it on behalf of the community.**

Source: Chiefs of Ontario. 2010. *Traditional Knowledge Primer*. Toronto: Chiefs of Ontario.

UNDRIP articles 25 and 26 explain Indigenous conceptions of territories.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

- 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.**
- 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.**
- 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.**

Source: United Nations. 2007. *United Nation Declaration on the Rights of Indigenous Peoples*. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

TK Decision Making and Governance: Caretaking and Stewardship

As noted above, First Nations peoples had their own diplomatic, political, legal and governance systems for thousands of years. This means that First Nations peoples had their own laws, processes, protocols, codes of conducts, and ethical and moral codes relating to the generation, innovation, sharing and protection of their own knowledge. It is important to maintain the governance and guardianship over your own knowledge.

Indigenous knowledge supported Indigenous environmental decision making for thousands of years and continues to do so. It is important to exercise your governance authority over your own knowledge

Indigenous Peoples are increasingly asserting sovereignty and governance over their own TK systems. In Canada, a consideration of TK in various environmental regimes is more than two decades old, and includes legislation such as the *Canadian Environmental Protection Act, Impact Assessment Act* (formally *Canadian Environmental Assessment Act*), *Species at Risk Act* and, more recently, the *Fisheries Act*. However, concerns remain regarding how knowledge is shared and for what purposes. Usually, it was proponents rather

than the affected First Nations that conducted TK studies. In effect, the TK studies consisted of “extracting” knowledge from communities and TK holders. To counter this long-standing practice, Indigenous communities are developing their own TK protocols, guidance documents and processes to maintain governance over their own knowledge. This TK Module will provide resources for you to develop your own TK protocol, thus ensuring you remain the decision maker over your own knowledge.

The Rights and Value of TK

The recognition of TK is closely tied to the recognition of Aboriginal and treaty rights and the ability to exercise such rights. As noted above, UNDRIP, to an extent, offers a framework for how external interests can support TK, through laying out what is required to support Indigenous self-determination from political, economic, social, health, legal, cultural and spiritual perspectives.

This means that Canada and its various governments and agencies have an obligation to support Indigenous Peoples in developing their “measures” to protect TK. TK is part of the recognition of Indigenous rights, treaties and self-determination.

Example Protocol

Mi’kmaw Ethics Watch: The Research Principles and Protocols provides a prescribed approval process to the collection, analysis and reporting of research data generated from Mi’kmaq First Nation communities throughout the province of Nova Scotia.

Roles and Responsibilities:

- a. **“Any research, study or inquiry into collective Mi’kmaw knowledge, culture, arts or spirituality which involves partnerships in research shall be reviewed by the Mi’kmaw Ethics Watch” (p. 17).**
- b. **“The Mi’kmaq Ethics Watch (Committee, etc.) shall conduct a fair and timely review of all research conducted among Mi’kmaq people and shall maintain control over all research processes” (p. 17).**
- c. **“List of Mi’kmaw Ethics Watch Obligations found on page 20.”**

Source: Mi’kmaw Ethics Watch. Undated. <https://www.cbu.ca/wp-content/uploads/2019/08/MEW-Principles-and-Protocols.pdf>

An important aspect of rights and TK includes intellectual property. Unfortunately, First Nations cannot fully protect TK under current intellectual property regimes in Canada. Therefore, it is important to be explicit about how TK will be protected through the development of your own protocols and processes.

CASE STUDY

LHOOSK'UZ DENÉ NATION AND ULKATCHO FIRST NATION

The Lhoosk'uz Dené Nation and Ulkatcho First Nation jointly conducted a TK study, and it resulted in information that they used to protect both their land and religious rights.

The TK study was part of the consultation process for the Blackwater Gold Mine Project. Lhoosk'uz Dené Nation and Ulkatcho First Nation hired Keefer Ecological Services Ltd. to compile and write the information. The proponent made accommodations.

The proposed site for the mine was Mount Davidson, which was important due to its sacred sites, healing powers, and hunting and berry-picking grounds.

To design the study, meetings were held with the Indigenous Nations, federal and provincial governments, Elders, Band members and staff to develop a methodology. The methodology they designed was to gather information about the types of potential risks to the environment and human health. They did so by holding community meetings and information sessions, conducting community interviews, circulating newsletters to inform the community, and meeting with Chiefs and Councils multiple times.

From there, baseline information on the at-risk parts of the environment was collected from community interviews, Traditional Knowledge, traditional use studies, and pre-existing information from sources such as Statistics Canada, Indian and Northern Affairs Canada, and North-

ern Health Authority. Additional Traditional Knowledge from past land use studies was also used. This baseline information was collected over a period of three years. These risks were then rated based on the inherent risk level and the potential for mitigation measures.

In response to the potential impacts, the proponent proposed mitigation measures. These were “generally incorporated” into the provincial and federal conditions for project approval. For example, the development plan was adjusted to minimize the impact on Mount Davidson, treat polluted water, store fuel and refuel outside of riparian areas, etc.

Source: Lhoosk'uz Dené Nation and Ulkatcho First Nation Part C Blackwater Gold Mine Project (Blackwater). May 10, 2019. Peoples. <https://ceaa-acee.gc.ca/050/documents/p80017/130537E.pdf>

Why use TK in an EA?

Most First Nations are located in rich, biologically diverse areas where there is an abundance of forests, water, wildlife, etc. They have lived in balance with their surroundings or in a “sustainable” way for thousands of years. The people in these communities possess knowledge of how to continue to live in this “sustainable” manner. However, proponents, governments and others often view First Nation territories as natural resources to be exploited for economic gain. It has become an important challenge for all peoples to seek a balance that will allow for prosperity (as defined by the First Nation) and ensure a sustainable planet for future generations. The collective knowledge systems or TK of the community will assist in achieving well-being for the community.

First Nations have treaty and inherent rights to access their territories for hunting, gathering, fishing, medicine-gathering and spiritual activities. Often, when industries and governments enter the First Nations’ territories to take resources, the damage to the territory is immense and it will take hundreds of years for the earth to repair itself. Some change are irreversible. The people, land and waters are often harmed. Thus, First Nations must

be involved in the decisions that impact the lands, waters, wildlife, forests, etc., that they rely on.

Therefore, it is not a question of “why use TK” but rather a question of “how to use TK” in EAs to ensure that Indigenous Peoples maintain governance and control over decision making regarding their own knowledge. It also becomes important to protect TK from misuse or appropriation. First Nations peoples often feel an enormous responsibility to share TK so better decisions can be made regarding the environment. First Nations are highly motivated to protect the environment for future generations, and thus feel compelled to become involved in processes that might offer opportunities for better, more sustainable decision making by others.

It becomes very important for Indigenous Peoples to maintain decision-making authority over their own knowledge and to self-determine the terms and conditions by which TK will be shared by external interests.

Risk Assessment

Due to the heightened interest in TK, it is important to be cautious about who is seeking TK from your community and why. In the past, when Indigenous Peoples have

shared TK in EAs, their TK was not always considered or used, despite numerous studies being undertaken (usually by the proponent and external consultants). In some cases, First Nations have reported that their TK was used against them in legal proceedings. It is important to assess the risks of sharing your knowledge in EAs, as it is very difficult to ensure your knowledge will be protected (or even considered in decision making). You must assess the risk against the benefit of contributing your knowledge to an EA, and the degree of control you will have over your knowledge once it leaves your community.

Protecting TK in EAs

EAs are a public process and information submitted as part of the process is typically available to governments, the public and proponents. It is, therefore, important that First Nation communities have a process in place to protect their knowledge from misrepresentation and misuse. (See the References & Resources Module for samples of TK protocols.)

Considerations in Conducting a TK Study

If your First Nation wishes to include TK as part of an EA, there are several challenges to consider. These include:

- TK studies can be expensive, as they can require significant time and resources. However, if your community is interested in conducting a TK study and the project is fairly large, it is likely that the proponent will provide funding for the project. Request funding from the proponent to conduct your own study or hire your own expertise to engage in your TK work.
- Conducting a TK study is broader in scope than EAs that rely exclusively on scientific knowledge. A TK study will be based on the holistic-ecosystem approach and will, therefore, include information that the community believes is important to include in an EA. Proponents may not agree that the scope should be broader; however, First Nations should include knowledge and perspectives they feel are necessary for the decision that will best protect their community and rights.
- If your community wishes to include TK as part of smaller EA projects, it may be a challenge to acquire funds to do so. Persist in seeking funding.
- Gender-based analysis: It is important to consider gender in your EA and TK study. Men, women and other genders often hold different TK or have different responsibilities, so it is important to consider gender in your TK work.
- In some cases, a community may want to conduct a TK study but may not have people within the community who are trained to conduct the formal TK studies that are required as part of EA processes. Ensuring that the TK study can undergo the rigour of a community, consent, peer and public review is an important consideration.
- An EA requires many concurrent activities, such as reviewing the proponent's information, meeting and negotiating with the proponent, and providing written submissions to the government. There is considerable work involved in participating in an EA process effectively. Assigning EA work to staff who already have other work responsibilities may place a heavy workload on some staff. Communities may need to consider getting help from outside the community. If you choose to retain outside assistance, you must govern and manage the EA and subsequent TK process. (For more information on this topic, see the Conducting a First Nations Traditional Knowledge [TK] Study for the Purpose of Environmental Assessment.)
- Smaller First Nation communities can request assistance from regional organizations, such as Tribal Councils, provincial/territorial organizations and technical institutes, should their own capacity require this. Depending on the scope of the EA, it may be ideal that TK is coordinated on a large scale. Some First Nation communities may request assistance from other communities with more experience and expertise in EAs and TK studies.
- Often the schedule is tight in an EA process. The time from a project's announcement to the filing of the EA application can vary from as little as a few months to as much as a few years. Typically, though, the process is less than a year. If the proponent has initiated communications with your community early in the process, there is a better chance that there will be time to do a TK study. There is also some opportunity to negotiate schedules with the proponent and the government agency if you can make a strong case for needing the time to provide your input. In some cases, the proponent will commit to ongoing TK work after the EA has been submitted.
- As an EA may take a long time to complete, sustaining effective community input can be a challenge. Ideally, the TK study should occur before or alongside the EA study.
- One of the most challenging aspects of conducting a TK study for the purposes of EA is deciding what information is appropriate to share with external agencies (proponents, governments and the public). Protecting intellectual property relating to TK is likely one of the most important decisions a community must make.

- First Nations not familiar with the formal government-developed EA processes need to gain adequate knowledge of these EA processes to be able to influence the process with their collective TK.
- It is important to distinguish a TK study for the purposes of an EA from other types of TK-related research, such as land use and occupancy studies and cultural heritage studies. All of these studies are nonetheless useful for TK studies, as they will have already gathered information that may be relevant for a TK study for the purposes of an EA.

Many of these considerations can be managed in the development of a TK protocol or process for your community. It will assist you in determining risks/benefits and build transparency and accountability into the TK and EA processes.

Legal and Policy Considerations

The Government of Canada has created an *Indigenous Knowledge Policy Framework* for project reviews and regulatory decisions. This document creates the broader policy framework for the consideration of TK in various legislation. See <https://www.canada.ca/en/impact-assessment-agency/programs/aboriginal-consultation-federal-environmental-assessment/indigenous-knowledge-policy-framework-initia->

[tive.html](https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/protecting-confidential-indigenous-knowledge-under-the-impact-assessment-act.html). The broad TK policy framework will enable relevant federal departments to develop their own specific policy and guidance for their federal officials. This guidance document is intended for federal officials, not proponents. The Impact Assessment Agency will also prepare general proponents' guidelines.

Various government agencies have developed their own guidelines for the consideration of TK in their processes. For example, the Government of Canada's Impact Assessment Agency has developed a practitioner's guide. See <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>. This guidance also contains a section on how to engage and partner with Indigenous communities. See <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/overview-indigenous-engagement-partnership-plan.html>

More specifically in relation to the consideration of TK, see <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/indigenous-knowledge-under-the-impact-assessment-act.html>. Furthermore, relating to the protection of confidential knowledge under

the *Impact Assessment Act*, see <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/protecting-confidential-indigenous-knowledge-under-the-impact-assessment-act.html>.

In Ontario, the way TK is incorporated into EA processes is as varied as each project is different, and communities hold varying views on whether they wish to share TK more broadly. The provincial EA legislative and policy framework changes over time, and thus advocacy become very important in advancing your concerns and interests.

In addition to the TK policy framework, there is legislative recognition of TK in Canada, and TK is assuming a more prominent role in environmental decision making. Therefore, it is increasingly recognized by government agencies and proponents that TK is an important part of EAs. Regulatory processes (such as impact assessments, project reviews and regulatory decisions) increasingly require TK, and thus external interests wish to access this knowledge for these processes. More recently at the federal level, the following acts have TK provisions:

- The *Impact Assessment Act*
- The *Canadian Navigable Waters Act*

- The *Canadian Energy Regulator Act*
- The fish and fish habitat protection provisions of the *Fisheries Act*

In your discussions with federal officials or the proponent about the project, you can indicate your interest in including TK. You can do this either by conducting a new TK study or using the TK your community may have already gathered. If you need to conduct a TK study, insist that it be funded by the proponent or government agency. A TK study should be formal in that it is a **transparent, accountable and open process** so that the community knows why the study is being conducted and what TK is going to be shared with the proponent.

It is important to realize that the TK study is your community's property. Therefore, protection mechanisms need to be developed and decisions need to be made on what your community is willing to provide to the EA process. It is also important to note that what your community does share with the proponent will become public information.

Using Existing Information for a TK study

Many First Nations have made substantial efforts over the years to collect information from their Elders, land users and other

knowledge holders for various reasons. Some First Nations have been involved in land claim negotiations, and related environmental management processes that require some form of TK (such as Native Values mapping in Forest Management Planning, or Species at Risk assessment and recovery work). Some communities may have completed TK studies and, therefore, relevant information may already exist. Start by examining the documented material already available in your community. It is very important to do your homework and ensure that Elders, knowledge holders and practitioners are not over-burdened with TK studies that repeatedly ask the same questions. Ensure that knowledge holders have granted consent for the use of the knowledge they provide and that your community maintains the intellectual property of the knowledge.

Other valuable sources of TK information are often interview tapes, transcripts, and maps produced through interviews with knowledge holders. Other documents, plans, surveys, photographs, studies and research papers may also be available and useful. Once you have compiled the information, examine the material to identify gaps in information, geographic coverage or the historical record, particularly for information that relates to the proposed projects.

Gathering New Information for a TK Study

Consider conducting a new TK study if:

- There are information gaps (the existing information does not specifically address the area in question).
- Time has lapsed since the last TK study was completed.
- The geographic focus has changed since the last TK study was completed (e.g., larger geographic area).
- The study will be of benefit to your community in other contexts.
- The project is large and complex and will require continued engagement over time as plans change.
- There is the potential for the project to have significant effects on your community.
- The existing information is dated and there is a need to understand and compare current and traditional land use patterns. (Note: land use and occupancy studies are NOT TK studies, but they are very helpful.)
- There are likely to be more projects of a similar nature in future years.

Funding Sources

Up until recently, in almost all cases where TK studies are conducted in EAs,

the proponent provides the funding (often by external consultants) to the community. Since the proponent may be required to consider TK in their EA, it is in their interest to fund any necessary TK studies.

As federal government officials are required to consider TK in regulatory deci-

sions and project reviews, they too will require TK. As such, they should fund TK studies. Funding associated with legislation is often limited. It is important to advocate for what you need to conduct your studies in order to make the best decisions possible. It will be important to advocate for funding beyond what is

available through existing provisions in legislation or policies.

Benefits of Conducting a TK Study

Government officials and proponents stand to benefit a great deal from your decision to share TK in EAs. It is important to ensure that the sharing of TK in EAs will benefit your community beyond the life of the project assessment (and project). TK that you collect and document can also be utilized in educational activities, land-based programs with youth, and knowledge and revitalization initiatives. Give serious thought to how TK studies can provide co-benefits to your community and future generations in achieving their goals.

Summary

The decision to participate in an EA and contribute TK is a profoundly important one, one that affects the well-being of your community, the environment and future generations. There are indeed risks, and the best way to manage risks is to maintain governance, authority, jurisdiction and sovereignty over your knowledge. Key considerations include:

- TK, in various forms, has existed for thousands of years. It is not new.

The federal government, under the *Impact Assessment Act* (administered by the Impact Assessment Agency), may provide funding for the following activities:

- **“Developing or supporting organizational capacity of Indigenous communities or organizations to participate in, direct and/or undertake assessments, as well as delivering information, data and studies to support the implementation of regional/strategic approaches or project impact assessments;**
- **Strengthening awareness of impact assessment (IA) issues within Indigenous communities through outreach activities; and**
- **Designing and delivering workshops; training programs or materials for Indigenous Peoples, communities or organizations related to IA, including activities to:**
 - » **document current use of the land or resources;**
 - » **identify environmental, health, social or economic impacts, impacts on rights, or document Indigenous knowledge;**
 - » **participate in, lead and/or direct a project IA process;**
 - » **lead community engagement and coordinate consultation; and**
 - » **participate and/or lead follow-up and monitoring activities.”**

Source: Impact Assessment Agency of Canada. 2022. *Indigenous Capacity Support Program*. <https://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/indigenous-capacity-support-program.html>

- Recognition of, and interest in, TK by external interests is relatively recent.
- TK is increasingly recognized at local through to international levels in agreements, conventions, legislation, policies, programs and practices.
- TK resides in the people, the community and the land (places). TK may not be tangible or quantifiable in ways inherent to other knowledge systems (e.g., western science).
- Resistance to accepting TK as being on par with other knowledge, such as western science, remains an ongoing challenge.
- Often the scope of an EA that is important to First Nations extends beyond “reserve lands,” and thus it is important to determine the territories that matter to you in the EA process. It is important to determine what territories and lands your Nation is responsible for, and seek to assert authority and jurisdiction over your lands and livelihood.

The next section of this TK Module outlines a TK process that you can consider and adapt to suit your needs should you decide to get involved in such studies.

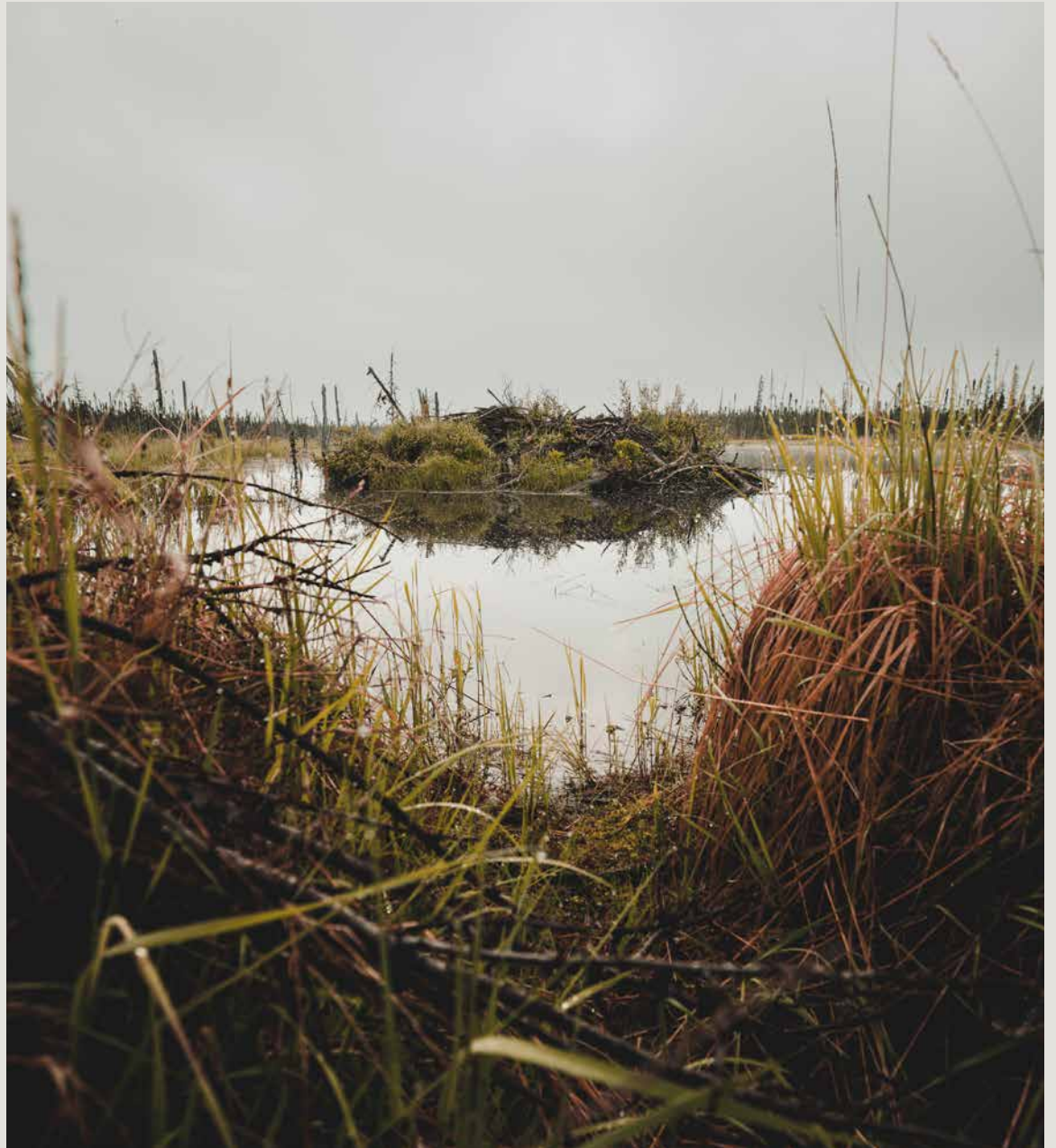
REFERENCES

See the References & Resources Module for a full list of references to this section.

Note: All URLs listed below were active at the time of writing this publication. If a URL is no longer active, search the document's name online, or contact the organization directly.

Indigenous Laws Module

03



AT A GLANCE

What is in the Indigenous Laws Module

This Module deals with how First Nations use their own laws in the environmental assessment (EA) process. It includes information and discussion about the revitalization and application of Indigenous law to EA processes, drawing on the work of Indigenous scholars and Knowledge Holders, including lawyers and academics, who have focused on identifying and asserting Indigenous laws in the Canadian legal system. Those Indigenous laws are based on knowledge provided by Elders, Indigenous lawyers and academics, and Knowledge Holders. This Module also considers sources and historic interpretation of Indigenous law, and sets out examples of how some First Nations have revitalized and applied Indigenous law in an EA context.

What is included in this Module is not an exhaustive list of Indigenous law sources or practices First Nations can draw on. Many First Nations may find their laws rooted in other processes and sources, which do not necessarily fit neatly within the frameworks and categories that are discussed here. There are multiple sources for Indigenous laws and they can be expressed in different forms and structures. First Nations should consider the following information as offering some tools that can help First Nations structure their own unique laws, but they are not the only tools that are available.

With that in mind, the Module offers several methods and sources that First Nations may

consider in identifying their own laws for the purpose of participating and asserting their laws in EA processes. This Module is divided into the following sections:

Section 1: Sources and Forms of Indigenous Law

Section 2: Methods for Revitalizing Indigenous Law

Section 3: Examples and Case Studies of Indigenous Law in Action in EA Processes

As discussed in the Canadian Legal System Module, when we talk about EA, we are referring to processes required under federal and provincial law to review the possible environmental impacts of a project before it is approved. The focus is on EA under federal and provincial laws. However, many First Nations across Canada have conducted their own EA for a project, whether by asserting jurisdiction over projects proposed in the First Nation's traditional territory or EAs for projects on reserve, and we include examples of these types of EAs in this Module too. The focus of the Indigenous Laws Module is about **how First Nations have guided and informed, and can continue to guide and inform, the EA process based on their own laws.**

SECTION 1

Sources and Forms of Indigenous Law

Indigenous law refers to First Nations' own legal systems that govern their relationships, that they use to manage and relate to their lands and waters, and that they use to resolve conflicts. First Nations always had their own legal systems, but many of those systems were displaced by the imposition of foreign laws and systems through colonialism.¹ Despite that displacement, First Nations' legal systems still exist. This section will review some sources and forms of Indigenous law.

It is important to note that First Nations often have different sources, experiences and understandings of their Indigenous laws. Indigenous law informs how First Nations' make political and social de-

isions, and informs how First Nations manage and relate to lands, waters, animals, and other people.² For some, Indigenous legal traditions and principles are fundamental in terms of how they guide behaviours and understandings of how to interact with lands and waters. As such, it can be challenging for a First Nation to identify and communicate very specific legal principles that need to be followed in federal or provincial EAs. This is even more difficult because of the history of colonialism that Indigenous Peoples have been subjected to in Canada. Colonialism functioned to reduce, if not entirely deny, the existence of Indigenous law.

In this context, we draw on the work of Indigenous law scholars, such as Professors John Borrows and Val Napoleon, about identifying and revitalizing Indigenous laws. The work of scholars like Dr. Borrows and Dr. Napoleon has been focused on advancing the understanding



- 1 Manitoba, Aboriginal Justice Inquiry of Manitoba. 1999. *The justice system and Aboriginal People*, vol 1 (Winnipeg), at chapter 2, p. 1.
- 2 Napoleon, V. *Thinking about Indigenous legal orders*. 2007. National Centre for First Nations Governance, at p. 2.

of Indigenous legal traditions within the Canadian legal system.

This section also draws on the work of several other Indigenous law academics including Darcy Lindberg, Naomi Metallic and Hadley Friedland.

Sources of Indigenous Law

Indigenous law lives in many places. These places might be different for different First Nations.

Five Sources of Indigenous Law

Dr. Borrows, a legal scholar and member of the Chippewas of Nawash Unceded First Nation, talks about five sources of Indigenous law:³ sacred law, natural law, deliberative law, positivistic law and customary law.

The following section reviews these types of law and provides some examples on how they can be applied. Importantly, many expressions of Indigenous law rely on multiple types of law. For example, a land-based

learning might rely on sacred knowledge about animals or sacred sites, and so help to inform law, while one might learn about natural law through storytelling and oral history shared by Elders. Given that, the following types of law are described more categorically than it may work in practice.

1. Sacred Law

Dr. Borrows explains that Indigenous “[l]aws can be regarded as sacred if they stem from the Creator, creation stories, or revered ancient teachings that have withstood the test of time.”⁴ Sacred laws are given the “highest respect” because they are from the Creator, and “contain instructions about how all beings should relate to specific territories.”⁵

An example of sacred law is the Anishinaabe principle of **minopimàdiziwin**. According to *minopimàdiziwin*, the land is not to be exploited for human gain. *Minopimàdiziwin* requires that Anishinaabe create a reciprocal relationship with land and “achieve balance with nature.”⁶

Sources of Law



Sacred law
manidoo-inaakingewin



Natural law
akinoomagewin



Deliberative law
dazhidaa'idiwin inaakingewin



Positivistic law
ozhi'bii-inaakingewin



Customary law
kinwezhawewin

³ Borrows, J. *Canada's Indigenous constitution*. 2010. University of Toronto Press, at 33-66.

⁴ Borrows, J. *Canada's Indigenous constitution*. 2010. University of Toronto Press, at 34.

⁵ Borrows, J. *Canada's Indigenous constitution*. 2010. University of Toronto Press.

⁶ Sioui, M., & Mcleman, R. 2014. Asserting mino pimàdiziwin on unceded Algonquin territory: Experiences of a Canadian 'non-status' First Nation in re-establishing its traditional land ethic. 2014. 10:4 *AlterNative: An International Journal of Indigenous Peoples*, at 365.

This reciprocal relationship demands that people live in balance with all created beings, and posits that the land is not an object to be used for human ends but a “member of the community who demands the highest respect.”⁷ Eva Petoskey, a former elected official of the Grand Traverse Band of Ottawa and Chippewa Indians (a Nation located in Michigan), described *Minopimàdiziwin* thus:

... [I]f you were to be standing in your own center, then out from that ... are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people ... And out from that, the other living beings ... the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the manitous, the various spiritual forces within the world. So when you say that, mino-bimaadziwin, you’re saying that a person lives a life that has really dependently arisen within the web of life. If you’re saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.⁸

2. Natural Law

Natural laws are described as being “written on the earth.”⁹

A natural law may be based on observing how a plant interacts with an insect, or how animals interact with each other; the First Nation draws legal principles from that experience.¹⁰

An Elder or Knowledge Holder might practise natural law by “recognizing and protecting the relationship between butterflies and milkweed,” or otherwise understanding how different animals or objects in the natural world interact.¹¹

An example of this type of law is the Taku River Tlingit First Nation’s natural law. This is often associated with Tlingit Traditional Knowledge, and works to

preserve woodland caribou herds in northern British Columbia and Yukon.¹²

Tlingit Elders and Knowledge Holders drew from both on the land teachings and oral histories in describing caribou migration and settlement practices.¹³ Specifically, Elders used natural law to understand that caribou, in the winter, used low-elevation forests, especially mature lodgepole pine with lichen ground cover. Elders also indicated that caribou herds used low-elevation valleys and lakes as predator escape terrain.¹⁴

Collectively, interviews with Elders about Traditional Knowledge helped to identify their natural law, and can be used to inform and create a legal framework that supports ecological revitalization efforts.

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- ⁷ Maclean, Y.Y. 2021. Land ethics in conflict. 1:2 *Aletheia*, the Arts and Science Academic Journal, at p. 7.
 - ⁸ Petoskey, E. 2012. 40 years of the Indian Civil Rights Act: Indigenous women’s reflections. In Carpenter K.A., Fletcher M.L.M., & Riley A.R. *The Indian Civil Rights Act at forty*. Los Angeles: UCLA American Indian Studies Center, 39 at 47.
 - ⁹ Napoleon, V., & Friedland, H. 2015. *Indigenous legal traditions core workshop materials*. Victoria: University of Victoria, at 4.
 - ¹⁰ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 28-29.
 - ¹¹ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 30
 - ¹² Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management*, 78(1): 112-121.
 - ¹³ Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management*, 78(1): 117.
 - ¹⁴ Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management*, 78(1), at page 117.

The Gitksan's verbal records about past interactions with the local environment, known as *adaawk*, also show how oral history can represent the practice of natural law. This suggests that First Nations might look to oral histories to represent natural law in addition to on the land teachings. The Gitksan are from the northwest coast of British Columbia, and they form part of the Tsimshian language family.¹⁵ The *adaawk* (collective oral history) tells of the origins and migrations of the Gitksan to their current territories and establishes ownership over their land and resources. To communicate *adaawk* and ensure that actions are compliant with *adaawk*, *adaawk* are recounted at Gitksan feasts.¹⁶

3. Deliberative Law

Deliberative law is created when individuals speak to each other. The conversation could involve one community member convincing another of their point of view, community members sharing how they arrived at opposing opinions, or community members debating one decision over another.¹⁷

Dr. Borrows explains that deliberative law can “adapt to changing circumstances in accordance with the needs and priorities of members and in response to external

pressures.”¹⁸ In other words, as circumstances change, First Nations can revise laws to ensure that laws are responsive to contemporary pressures. As well, deliberative law allows community members to call out outdated and unhelpful practices, ensuring that laws are not oppressive.¹⁹

The Navajo philosophy of *beehaz aoanii* shows how deliberative law is practised.²⁰ The Navajo use the Peacemaker Ceremony to draw a connection between spirituality and law when applying Navajo law to modern conflicts.²¹ This model is based on the Navajo tradition of “talking things out” and involves building a talking circle between conflicting parties. The Navajo delegate an Elder

or Knowledge Holder as the *naat’anni*, who sits in the middle of the talking circle and guides the conversation. The *naat’anni* leads the “justice” process by encouraging dialogue and applying Navajo law to the conflict.²² This person relies on storytelling to restore “harmony and good relations” and help the parties problem-solve.²³

Another example of deliberative law is the Haida use of the Potlach. The people of the Haida Nation have occupied Haida Gwaii (located off the western coast of British Columbia) since time immemorial.²⁴ The Haida have clans with hereditary Chiefs²⁵ who are appointed by the matriarchs of the clans.²⁶ The pot-

¹⁵ Napoleon, V. 2019. Did I break it? Recording Indigenous (customary) law. 1:22 *PER* 2, at 3.

¹⁶ Napoleon, V. 2019. Did I break it? Recording Indigenous (customary) law. 1:22 *PER* 2, at 18.

¹⁷ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 44.

¹⁸ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 47.

¹⁹ Napoleon, V. & Friedland, H. 2015. *Indigenous legal traditions core workshop materials*. Victoria: University of Victoria, at 4.

²⁰ Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3).

²¹ Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3), at 165.

²² Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3), at 170.

²³ Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3), at 172.

²⁴ Council of the Haida Nation. March 2022. *History of the Haida Nation*. Council of the Haida Nation. <https://www.haidanation.ca/haida-nation/>

²⁵ Quail, S. 2014. Yah’guudang: The principle of respect in the Haida legal tradition. 47:1 *UBC L Rev*, 673 at 649.

²⁶ Quail, S. 2014. Yah’guudang: The principle of respect in the Haida legal tradition. 47:1 *UBC L Rev*, 673.

latch is central to the Haida's traditional system of governance.²⁷ In 2016, a potlatch was hosted to strip two hereditary Chiefs of their titles. They were being stripped of their titles because they had supported Enbridge's Northern Gateway Pipeline, contrary to Haida community consensus to oppose the pipeline.²⁸ The Haida Elders considered whether the Chiefs' actions had breached the community consensus, and ultimately removed the Chiefs for breaching the law.

4. Positivist Law

Positivist law is used to describe rules and teachings that people follow solely because of the authority of the person proclaiming them. Positivist law could be recorded in agreements, treaties, judgments, statutes, songs, stories, wampum belts, scrolls, totem poles, button blankets and rocks.²⁹

The *Tekeni teyohá:te* (Two Row Wampum) is one example of positivist law. In 1613, the *Tekeni teyohá:te* recorded a diplomatic treaty between the Dutch and Haudenosaunee. Depicted as two parallel white lines on a purple background, the Two Row Wampum represents and codifies the intended relationship between the Dutch and Haudenosaunee. The *Tekeni teyohá:te* depicts two rivers, one for Haudenos-

aunee canoes and the other for Dutch vessels, travelling side by side but never interfering with one another.³⁰ The belt is an example of positivist law because it represents a treaty between two nations and the treaty derives its authority from the inherent jurisdiction of the nations that entered into the treaty.

A modern example of positivist law are by-laws passed by First Nations governments. Under the *Indian Act*, Chief and Council pass by-laws on reserve with respect to local matters and the community members.³¹ Naomi Metallic, a lawyer and law professor from the Listuguj Mi'gmaq First Nation, discusses how recent amendments to the *Indian Act* empower First Nations to legislate in accordance with Indigenous legal principles and self-government.³² The *Indi-*

an Act is a law that has been imposed on First Nations and part of the legal system that has served to undermine First Nations' own legal traditions. For that reason, many First Nations find the *Indian Act* challenging and constraining to work within. However, the *Indian Act's* by-law powers on reserve do allow First Nations to exercise control over local matters, including the areas of child welfare, social assistance and education. As such, some First Nations have used those powers to exercise their jurisdiction. For example, Spallumcheen First Nation passed the *Spallumcheen Indian By-law #3 – A By-law of the Care of our Indian Children*, in 1980.³³ This by-law relies on both the *Indian Act* and the inherent right of self-determination in giving the First Nation the power “to provide for the health of residents on the reserve,”

²⁷ Quail, S. 2014. Yah'guudang: The principle of respect in the Haida legal tradition. 47:1 UBC L Rev, 673.

²⁸ Kung, E. September 2016. *Field notes from the Haida Gwaii potlatch: Why government and industry should take heed of Indigenous governance decisions*. West Coast Environmental Law. <https://www.wcel.org/blog/field-notes-haida-gwaii-potlatch-why-government-and-industry-should-take-heed-indigenous>

²⁹ Borrows, J. 2016. Heroes, tricksters, monsters, and caretakers: Indigenous law and legal education. 61:4 McGill LJ, 795 at 821.

³⁰ Hawkins, C. 2020. *Across the Great Water: Indigenous tobacco and Haudenosaunee diplomacy in early modern England, 1550-1750*. Edmonton: University of Alberta, at 29-30.

³¹ Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 UNB, 211 at 215-16.

³² Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 UNB 211 at 212.

³³ Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 UNB, 211 at 219.

the power over “the observance of law and order,” and the power over “the prevention of disorderly conduct and nuisances.”³⁴

5. Customary Law

Customary laws are created through repetitive social interactions and are accepted as binding by those who participate in the interactions. Customary law relies on unspoken and intuitive agreements about how relationships should be regulated and what conduct is appropriate.³⁵ Customary law may be found in oral and written traditions, opinions of Elders or community consensus.³⁶

An example of customary law is the Anishinaabek custom of treating the environment as a participant in legal decision-making.³⁷ This Anishinaabek customary law can be seen in the *Nibi Declaration of Treaty #3*, which was ratified in 2019 at the Anishinaabe Treaty #3 Chiefs National Assembly.³⁸ The Declaration voices the relationship with Nibi (water) that all Anishinaabe have.

The declaration requires that the spirit of Nibi be central to decision-making and governance, and it follows Anishinaabek customary law because it respects the environment’s desire to be a decision-maker.³⁹

Examples of Indigenous Laws

Cree Law: Five Teachings

Darcy Lindberg, a Cree lawyer and assistant law professor, talks about five foundational ethical teachings which root Cree law and the good way:

- *Tâpwêwin* (truthfulness);
- *Tapateyimisôwin* (humility);
- *Wâhkôtowin* (law of relating);
- *Miyo-wîcêhtowin* (good aid/assisting); and
- *Witaskewin* (neighborliness).⁴⁰

These five Cree law foundational tenets derive from various sources described by

Dr. Borrows, including land-based natural law teachings, oral history deliberative law and other sources. Dr. Lindberg further describes how Cree use other vehicles for legal transmission, including dreaming.⁴¹ “[D]reams can be legal, but their legality is dependent upon their relation to these other systems of deliberation, and the interpretation that is offered by these deliberative mechanisms.”⁴² Dreaming relies on multiple sources and deliberative frameworks for their interpretation into law. Elders engage in deliberative law practices, such as storytelling or ceremonial practices, to interpret dreams and then suggest what legal impact they might have.⁴³

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- 34** Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 219.
- 35** Napoleon, V., & Friedland, H. 2015. *Indigenous legal traditions core workshop materials*. Victoria: University of Victoria, at 5.
- 36** Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 63.
- 37** Craft, A., & King, L. 2021. Deliberative constitutional amendments. 13:4 *Water*, 532 at 541.
- 38** Grand Council Treaty #3. May 2019. *Nibi (water) declaration unanimously supported at the Anishinaabe Treaty #3 Chiefs National Assembly*. Grand Council Treaty #3 <http://gct3.ca/nibi-water-declaration-unanimously-supported-at-the-anishinaabe-treaty-3-chiefs-national-assembly/>
- 39** Craft, A., & King, L. 2021. Deliberative constitutional amendments. 13:4 *Water*, 532 at 541.
- 40** Lindberg, D. Undated. *The richness of Witaskewin-Indigenous law and legal ethics teaching*. Presented by the Indigenous Initiatives Office, Faculty of Law, University of Toronto. <https://www.law.utoronto.ca/programs-centres/programs/indigenous-initiatives-office/iio-speaker-series>
- 41** Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law*. University of Victoria.
- 42** Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law*. University of Victoria, at 2.
- 43** Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law*. University of Victoria.

Cree Elder Doreen Spence affirms this process of oral stories and oral institutions interacting with other sources of Indigenous law. As Spence explains, Elders use their knowledge to apply Indigenous law in a way which best meets the needs of the community at a specific moment in time.⁴⁴ Elders, honoured for their knowledge and understanding of cultural and spiritual protocol within a Nation, use that knowledge to provide guidance and interpretation for their community.⁴⁵

Anishinaabe Law

Anishinaabe law is centred in relationships.⁴⁶ Anishinaabe-Métis lawyer and law professor Aimée Craft shares that “the Great Spirit instructed [Anishinaabe] to honour all of life and respect all of Creation.”⁴⁷ The relationship between Anishinaabe and other life informs a legal system that is structured relationally, with a realm of responsibilities to other creation. In Anishinaabe law, Professor Craft explains: “[W]hen considering the impact of our actions, we do not think in terms of parties with a direct interest, but rather we evaluate the many combinations of relationships within a broader web of relationships that exist within Creation.”⁴⁸

This reciprocity extends to include legal relationships to rocks, trees and water. For Anishinaabe, natural objects such as water are treated as actors in a relationship. In Anishinaabe law, water is an independent agent which interacts with other actors.⁴⁹

Anishinaabe law is non-hierarchical, with each level of law being part of a set of concentric circles dependent on each other for a complete legal understanding.⁵⁰ These levels include spiritual law, natural law and customary law.

Spiritual law is considered the Creator’s Law. This law is given to Anishinaabe through ceremony, creation stories, and laws otherwise passed through the Creator’s instructions.⁵¹ These are considered “an underlying set of normative values that reveal themselves to us regularly throughout our lives.”⁵²

Natural law derives from spiritual law, and is learned from the land and other beings in Creation.⁵³ This form of law, for Anishinaabe, is learned through obser-

⁴⁴ Spence, D. *The crucial role of Indigenous elders*. <https://www.youtube.com/watch?v=Ipyy8yVTVoQ>

⁴⁵ Stiegelbauer, S.M. 1996. What is an Elder? What do Elders do? First Nation Elders as teachers in culture-based urban organizations. *The Canadian Journal of Native Studies*, XVI: 1.

⁴⁶ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 56.

⁴⁷ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 56.

⁴⁸ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 56.

⁴⁹ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 58.

⁵⁰ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 58.

⁵¹ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 59.

⁵² Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 59.

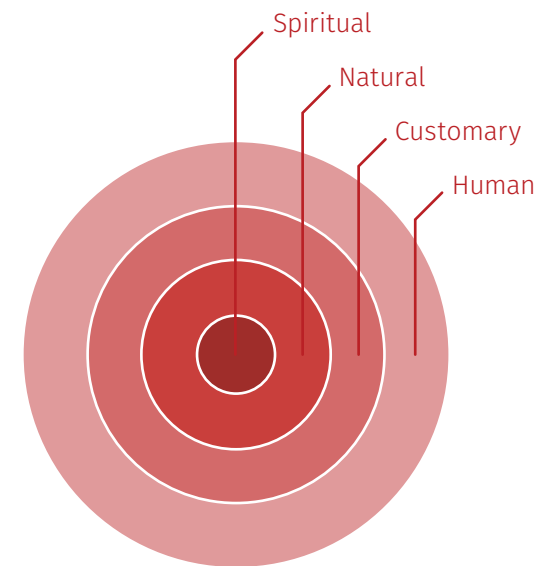
⁵³ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 59.

vation of how beings interact with each other. Anishinaabe natural law shows that balance is necessary between human relationships to other beings. Recognizing responsibilities to each other is necessary under natural law, both for the goal of working toward *mino-biimaadiziwin* (collective well-being) and for fulfilling the call to love based on the Creator's spiritual instructions.

Customary law is the application of these spiritual and natural law teachings to human relationships.⁵⁴ Some Elders explain Anishinaabe customary law as the Seven Grandfather and Grandmother teachings of love, honesty, respect, courage, humility, wisdom and truth.⁵⁵

Collectively, these forms of law each inform Anishinaabe law and often work in tandem. Consider the *Manito Aki Inakonigaawin*, adopted by the Grand Council of Treaty #3. *Manito Aki Inakonigaawin* was officially written and ratified by Elders of the Nation of Treaty #3 in 1997. In the spring and summer of 1997, a

gathering of Elders was held in Kay-Nah-Chi-Wah-Nung at Manito Ochi-waan. The Elders brought the written law through ceremony, where the spirits approved this law and respectfully petitioned the National Assembly to adopt it as a temporal law of the Nation. A traditional validation process was held through a shake-tent ceremony. Elders and Knowledge Holders worked extensively with the traditional shaker to decide the exact question to ask during the ceremony. This would allow for a clear understanding and the greatest certainty when asking the spirits for guidance in regards to writing the law.⁵⁶



⁵⁴ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 60.

⁵⁵ McGregor, D. 2013. Indigenous women, water justice and zaagidowin (love). 30:2-3 *Can Woman Stud*, 71, at 71-78.

⁵⁶ Grand Council Treaty #3. Undated. *Manito Aki Inakonigaawin*. <http://gct3.ca/land/manito-aki-inakonigaawin/>

SECTION 2

Methods for Revitalizing Indigenous Laws

Just as there are various sources of Indigenous laws and those sources may vary among First Nations, so too there are various means for revitalizing and asserting those Indigenous laws.

Some First Nations may choose to preserve their laws orally and others in writing. There are different frameworks and tools that First Nations use to preserve their laws, such as oral histories, consultation protocols, or written legal codes. Any and all of these may be used by First Nations when engaging in EA processes.

Whatever the framework, a First Nation may first want to engage in a process of identifying the central principles of their

Indigenous law in order to then revitalize and assert that law. This section summarizes two suggested methods for doing so: the participatory method and the case brief model.

1. A Participatory Method of Revitalizing Laws

The aim of the work of revitalizing Indigenous law is to identify Indigenous legal principles from various community sources, such as interviews with Elders and Knowledge Holders and research about oral traditions and histories. Then, that information is put into a format that can be used in Canadian legal frameworks, such as an EA process.

Typically (though not always), that is in a written format such as a statement of legal principles, a consultation or engagement protocol, or a declaration.

On the following page is a summary of one method that draws on best practices from organizations that work with First Nations on revitalizing their Indigenous laws – namely, the Indigenous Law Resource Unit⁵⁷ and West Coast Environmental Law.⁵⁸

⁵⁷ Indigenous Law Research Unit: A research unit at the University of Victoria's Faculty of Law. ilru.ca

⁵⁸ West Coast Environmental Law: Transforming the legal landscape. wcel.org

A Participatory Method for Revitalizing Laws



What is your First Nation's goal?

- Write down your laws to give to others?
- Create a Land Code?
- Develop a Consultation Protocol?



Gather your resources

- Where can you find about oral history, land-based learnings and other teachings?
- E.g., interview Elders, find historical records, transcripts from court claims



Analyze your sources to understand the legal principles

- What legal principles are in the information you collected?
- E.g., what do the oral histories and stories tell you about how to care for the environment or how to interact with others?



Gather the legal principles and create a framework

- Develop a clear framework, keeping in mind your goal. Clearly state the legal principles so that they can be asserted and enforced
- E.g., draft your law, Land Code or protocol



Report back to your First Nation

- Take the framework back to your First Nation for comment and feedback
- E.g., hold workshops, host engagement sessions



Revise the framework and report back

- Incorporate feedback and comments and report back to your First Nation

2. Case Brief Model for Revitalizing Indigenous Laws

Dr. Borrows provided a model for synthesizing Indigenous law⁵⁹ that treats First Nations stories as similar to case law from Canadian courts, and those stories are used to inform and create legal principles. Canadian law that comes from court cases is referred to as **precedent**.

Dr. Borrows describes how First Nations stories are similar to case law precedent, as they provide a reason for and reinforce consensus about broad principles. They justify deviations from generally accepted standards, and provide moral and cultural sanctions if precedent is violated.⁶⁰ As with court cases, oral stories can be used as a record of fact patterns and the moral sanctions for breaking Indigenous law.⁶¹

Dr. Hadley Friedland, an associate law professor at the University of Alberta, and

⁵⁹ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 646-665.

⁶⁰ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 647.

⁶¹ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 647.

Dr. Val Napoleon, a legal scholar and a member of the Saulteau First Nation and adopted member of the Gitanyow (Gitxan) House of Luuxhan, have built on Dr. Borrows' practice of "briefing" Indigenous oral stories.⁶² The case brief model is similar to what lawyers practising Canadian law do to summarize the legal principles that have been established or discussed in a court decision. You can use the case brief model to summarize the legal principles of oral history in a story.

This process for creating a set of legal standards from oral history can take place through two steps:

Step 1 – Identify single Indigenous oral histories and consider their legal meaning through the case brief model; and

Step 2 – Collect several oral stories and find the legal standard that comes from all of those stories.

Step 1 – Case Brief Model: Individual Oral Stories

The following is how you would structure a **Case Brief** for each individual oral story.⁶³

Case Brief:

- What is the name of the story?

Issue/Problem:

- What is the main human problem you are looking at within the story?
- What is the story trying to tell you?

Facts:

- What are the main parts of the story?
- Focus on the parts that matter to the issue or the main problem that you are looking at within the story.

Decision/Resolution:

- What is the resolution to the problem? Is there a decision that resolves the problem? If there is no clear human decision, what action resolves the problem?
- It is important to think back to the issue or problem you identified. Most stories have many decisions, and the key is focusing on what decision or action leads to the resolution to the particular issue or problem you are looking at.

Reason:

- What is the reason behind the decision or resolution? Is there an explanation in the story? If not, can you infer what the reasons are?

It is the shared and collective reasoning that makes this a legal analysis. Sometimes the stories state the reasons explicitly, meaning the reasons are stated clearly, and at other times the reasons are implicit, meaning you have to do some thinking to figure out the reasons. In either case, the task is to consider **the "why"** behind the decision or response.

After "briefing" an individual oral story, First Nations can then either use the individual law or moral teaching provided in the law, or move on to Step 2 as a way to continue building a larger legal framework based on multiple stories.

Step 2 – Case Brief Model: Multiple Oral Cases

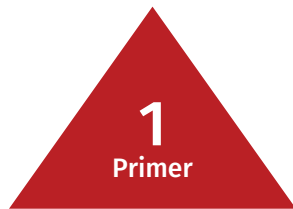
Dr. Friedland and Dr. Napoleon suggest a second step that has three stages: (1) Primer, (2) Synthesis, and (3) Preliminary Legal Theory.

1. Primer

Contextualize the story within the po-

⁶² Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16.

⁶³ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 23.



litical structure, legal order and history of the First Nations in order to inform the legal analysis. This is like a back-grounder on the individual First Nation so you can understand how the story fits within the culture and so you can understand the relevance of the story.

2. Synthesis

The synthesis stage is crucial. At this stage, First Nations can consider different elements of stories together and develop useful standards that explain, justify or are consistent with a group of particular legal decisions.⁶⁴ During synthesis, you are pulling standards from individual stories; together, these standards inform what the First Nation's law is and how it operates in response to a particular issue or in a particular context.⁶⁵

Through processing multiple stories from multiple Elders and Knowledge Holders, you can develop a broad analytical framework, that includes the following information:

1) Legal processes: Who are the primary decision makers? What are the steps involved in coming to a decision or resolution?

2) Legal responses and resolutions: What principles govern appropriate resolutions to harms and conflicts between people?

3) Legal obligations: What are the 'shoulds'? What principles govern individual and collective responsibilities?

4) Legal rights: What should people be able to expect from others – procedurally and/or substantively?

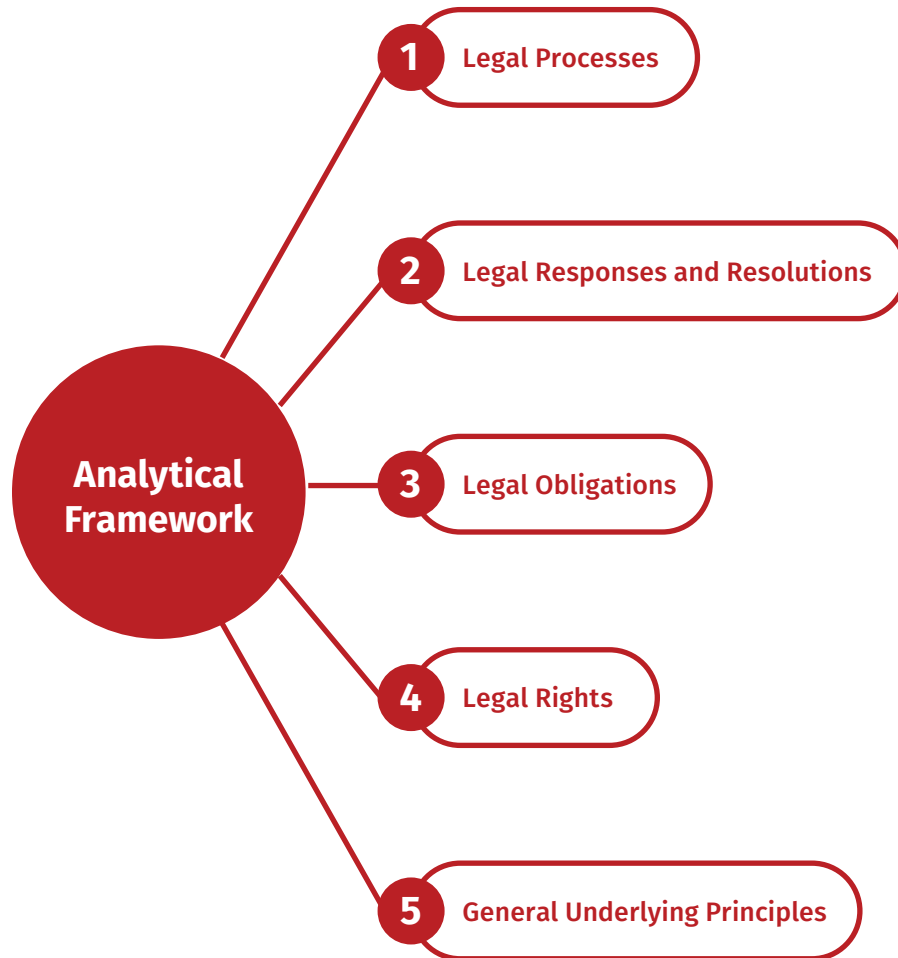
5) General underlying principles: What are other recurring themes? What are the principles that guide the expression and application of the law?

This system organizes information about the Indigenous law, whether collected through the case brief method or through observing other sources of law discussed earlier in this Indigenous Laws Module, and allows the information to be applied, added and adapted to present circumstances.⁶⁶

⁶⁴ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28.

⁶⁵ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28.

⁶⁶ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28 and 29.



3. Preliminary Legal Theory

The synthesis of Indigenous law through the compilation of relevant oral history can also support the development of a broader statement of a First Nation's legal theory or their Indigenous law. This can be helpful for First Nations interested in fully developing a legal code to be applied in different contexts – for example, in an EA process.

Resources to Help with the Process

First Nations approach the task of revitalizing Indigenous laws in different ways. For example, the Anishinaabek Nation's Legal Department launched the Revitalization of Anishinaabek Legal Traditions initiative. That initiative brought together Knowledge Holders from each of the Anishinaabek First Nations to share knowledge and to dialogue as to how Indigenous laws and customs might be successfully revitalized and implemented into the modern context.⁶⁷

Organizations and academic institutions are also good resources for First Nations. The Indigenous Law Research Unit (ILRU) is an academic institute dedicated to the revitalization of Indigenous laws and governance. ILRU partners with Indigenous communities to articulate their own legal principles and processes, on their own terms. ILRU collaborates with communities by invitation and focuses on the legal questions that drive the Nation's needs and goals.⁶⁸

⁶⁷ Ontario, Union of Ontario Indians. 2018. *Revitalization of Anishinabek legal traditions – Regional sessions – Final summary report*. North Bay: Anishinabek Nation Legal Department, at 4.

⁶⁸ University of Victoria. 2022. *Indigenous Law Research Unit (ILRU)*. University of Victoria Law. <https://www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php>

SECTION 3

Examples and Case Studies of Indigenous Law in Action in EA Processes

Many First Nations have created their own consultation and EA processes.⁶⁹ These processes tell governments and proponents how to engage with First Nations when developing in their territories.⁷⁰ In this section, we summarize case studies of how First Nations have asserted their Indigenous laws in various contexts. In some cases, this includes First Nations creating their own EA process, or defining how they participate in provincial and federal EA processes and consultation with the Crown. For others, First Nations have asserted their Indigenous laws through direct action on the land.

⁶⁹ Leclair, J., Papillon, M., & Forget, H. 2019. Les protocoles de consultation autochtones au Canada : Un modèle de convergence des systèmes juridiques autochtones et étatique ? *Recherches amérindiennes au Québec*, 25 at 26.

⁷⁰ Leclair, J., Papillon, M., & Forget, H. 2019. *Les protocoles de consultation autochtones au Canada : Un modèle de convergence des systèmes juridiques autochtones et étatique ? Recherches amérindiennes au Québec*, 25 at 29.

CASE STUDY

DESHKAN ZIIBIING DEVELOPS DUTY TO CONSULT PROTOCOL

Deshkan Ziibiing, known as the Chippewas of the Thames (“Chippewas”) are Anishinaabeg people who originally migrated to the Great Lakes area from the north-eastern region of North America. The majority of Southwestern Ontario is their modern traditional territory.⁷¹

In February 2013, Enbridge filed an application requesting that the National Energy Board (NEB) allow Enbridge to reverse the flow and increase the capacity of an oil pipeline called “Pipeline 9.”⁷² Pipeline 9 runs through the Chippewas’ traditional territory.⁷³

The Chippewas were opposed to the changes to Pipeline 9 because the pipeline was 40 years old and at risk of breaking. According to then-Chippewas Chief Myeengun Henry, “When a pipeline breaks, it devastates rivers and people and land.”

⁷¹ Deshkan Ziibiing Chippewas of the Thames First Nation. March 2022. *Welcome to Chippewas of the Thames First Nation*. Deshkan Ziibiing Chippewas of the Thames First Nation. <https://www.cottfn.com/>

⁷² Canadian Free Press. March 2014. Enbridge Line 9 pipeline reversal approved by energy board. *CBC News* <https://www.cbc.ca/news/canada/montreal/enbridge-line-9-pipeline-reversal-approved-by-energy-board-1.2562169>

⁷³ CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>

CASE STUDY

To decide whether to approve the changes to Pipeline 9, the NEB held public hearings. After the hearings, the NEB approved the pipeline changes but imposed three conditions on Enbridge – all of which were aimed at involving First Nations in environmental management of the pipeline.⁷⁴

Unhappy with the NEB's decision to approve the changes to Pipeline 9, the Chippewas took Enbridge to Federal Court, and then to the Federal Court of Appeal. Finally, the case was heard at the Supreme Court of Canada ("SCC"). The SCC found that the NEB had a duty to consult with the Chippewas. However, in this case, the SCC found that the NEB had met its duty to consult.⁷⁵

In November 2016, the Chippewas decided to create their own protocol for consultation called *Wiindmaagewin*. *Wiindmaagewin* outlines the Chippewas' expectations regarding proponent and government consultation within their traditional territory.⁷⁶ As made clear in *Wiindmaagewin*, the Chippewas expect proponents and governments to follow the principles of inter-societal governance and communication when consulting with the Chippewas.⁷⁷

Wiindmaagewin's purpose is to protect the Chippewas' watersheds, relationships and rights.⁷⁸ It also sets out the legal principles that will be used when interpreting *Wiindmaagewin*. These principles are:⁷⁹

1. *Gdinawendimi*: We are all related.
2. *MIno-bmaadiziwin*: The good life is possible by living in accordance with the Seven Grandfather and Grandmother teachings – *Nbwaakaawin* (wisdom), *Zaagidiwin* (love), *chi* (respect), *akde'ewin* (bravery), *Gwakwaadiziwin* (honesty), *Dbaadendiziwin* (humility) and *Debwewin* (truth). All proponents must demonstrate how the proposed project meets these teachings.
3. *Naaknigewin*, or law. All consultation and discussion must respect the Creator's law.
4. Anishinaabe *dbendizawin*, or Anishinaabe independence and self-determination. The Anishinaabe were created to live as an independent people. All proposals must respect the Creator-given independence of the Anishinaabeg.

74 CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>, at para 24.

75 CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>, at paras 5, 46.

76 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation.

77 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 7.

78 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 4.

79 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 8.

CASE STUDY

AAMJIWNAANG FIRST NATION'S CONSULTATION PROTOCOL

The Aamjiwnaang First Nation is a First Nations community of about 1,000 Anishinaabek people residing on reserve along the shores of the St. Clair River. The Aamjiwnaang's traditional territory covers much of Southwestern Ontario and the Great Lakes Region, including significant territory in what is now Michigan.⁸⁰

Aamjiwnaang's reserve lands are bordered by industrial and petrochemical developments, and there are concerns about the short- and long-term impacts of these industries. As a result of the industrial projects, the Aamjiwnaang decided to create a consultation protocol called the New Protocol.⁸¹

The New Protocol replaced a 2011 protocol where proponents had to meet 23 steps for consultation. The Aamjiwnaang wanted a refreshed protocol that would be more efficient and allow them to meet

timelines for recommendations to the province, Canada and developers.⁸²

The New Protocol was developed through a community-led process. During community engagement sessions organized by the Aamjiwnaang's Environmental Coordinator, members contributed opinions on how consultation should take place. For instance, the community decided when Chief and Council would participate in consultation, when community members would be informed about projects, and when community members would give opinions about proposals.⁸³

The New Protocol requires that when a proponent wants to build something new, install something, change a piece of equipment, or change the current layout of the land within Aamjiwnaang's traditional territory, the proponent must inform the Aamjiwnaang of their plan. For each submission, a project summary is created and then reviewed by the Nation's Environment Committee. The Environment Committee then makes recommendations to Chief and Council regarding the type of engagement needed from the proponent. The proponent must also provide capacity funding to ensure full and meaningful involvement by the Aamjiwnaang.⁸⁴

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- 80** *Consultation protocol – Aamjiwnaang.* 2018. Aamjiwnaang First Nation, at 1. <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>
- 81** *Consultation protocol – Aamjiwnaang.* 2018. Aamjiwnaang First Nation, at 1. <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>
- 82** Graf, C. February 2018. Aamjiwnaang developing consultation protocol. *Anishinabek News* <http://anishinabeknews.ca/2018/02/23/aamjiwnaang-developing-consultation-protocol/>
- 83** Graf, C. February 2018. Aamjiwnaang developing consultation protocol. *Anishinabek News* <http://anishinabeknews.ca/2018/02/23/aamjiwnaang-developing-consultation-protocol/>
- 84** Aamjiwnaang First Nation. March 2022. Environment projects. Welcome to Aamjiwnaang First Nation. <https://www.aamjiwnaang.ca/environment-projects/>

CASE STUDY

STK'EMLUPSEMC TE SECWÉPEMC NATION (SSN)'S ASSESSMENT PROCESS

Stk'emlupsemc te Secwépemc Nation ("SSN") is made up of the Tk'emlúps te Secwépemc and Skeetchestn Indian Band, one of the seven historic divisions of Secwepemc Nation. The Secwepemc people occupy a vast territory in the interior of what is now British Columbia.⁸⁵

The SSN created an assessment process in response to a proposed copper and gold mine within a culturally important place on the SSN's traditional territory.

In 2015, following British Columbia's assessment that SSN had a strong claim to title and rights in the area, SSN made a formal declaration of title to the area where the proposed mine would be located. SSN insisted that they conduct their own project assessment that would respect Aboriginal rights and title, and that would include giving SSN jurisdiction over how the land is to be used.

SSN's assessment process was based in Indigenous laws, customs and knowledge. Its EA process included independent expert reviews, community information sessions, a review hearing, and assessments of tangible and intangible impacts (e.g., impacts of a cultural and spiritual nature).⁸⁶ SSN's assessment integrated western and Traditional Knowledge. During SSN's assessment, more than 80 experts and Knowledge Holders shared their findings. In March 2017, after completing its EA, SSN announced it would not consent to the mine because the mine would negatively impact air and water quality, and irreversibly affect SSN's traditional territory.

Within two months of SSN's announcement, more than 30 organizations across Canada signed a declaration supporting SSN's assessment process and decision.⁸⁷

The information provided through the SSN assessment process was embedded and considered in both the federal and provincial EA. It informed the federal EA decision maker's decision that the project was likely to cause significant adverse environmental effects and cumulative effects to Indigenous heritage as well as the current use of lands and resources. Canada ultimately decided that the environmental effects could not be justified, and the project was not approved.⁸⁸

85 Tk'emlúps te Secwépemc. March 2022. Our land. <https://tkemlups.ca/profile/history/our-land/>

86 Stk'emlupsemc te Secwépemc Nation. 2015. *SSN project assessment process: Proposed Ajax project*. Stk'emlupsemc te Secwépemc Nation. https://miningwatch.ca/sites/default/files/ssn_project_review_process_1page_0.pdf

87 Mining Watch Canada & Stk'emlupsemc te Secwépemc Nation. December 2017. *Help protect Pípsell*. <http://protectpipsell.ca/>

88 Mascher, S. June 2019. Aligning Canadian impact assessment processes with the principles of UNDRIP. *CIGI*. <https://www.cigionline.org/articles/aligning-canadian-impact-assessment-processes-principles-undrip/>

CASE STUDY

TSLEIL-WAUTUTH NATION (TWN)'S INDEPENDENT ASSESSMENT OF KINDER MORGAN'S TRANS MOUNTAIN EXPANSION PROJECT

The Tseil-Waututh Nation (“TWN”) are a Coast Salish nation whose territory includes Burrard Inlet.⁸⁹

In 2009, TWN adopted a Stewardship Policy, which is an expression of Tseil-Waututh jurisdiction and law. The Stewardship Policy mandates that TWN review any proposed development inside TWN’s Consultation Area. The Consultation Area encompasses the waters and lands traditionally used by TWN.⁹⁰

Under the authority of the Stewardship Policy, TWN created an EA process.⁹¹

In May 2015, TWN applied their EA process to Kinder Morgan’s Trans Mountain Expansion Project (TMEX). The project proposed to expand the Trans Mountain pipeline system, and would result in a seven-fold increase of tanker traffic through Burrard Inlet. The facilities and the last 28 kilometres of the pipeline are in the heart of TWN territory.⁹²

TWN’s EA was grounded in TWN Law (*snəwayəł*) and backed by scientific and anthropological expert evidence.⁹³ TWN’s EA concluded that the TMEX proposal had the potential to deprive past, current and future generations of control and benefit of the water, land, air and resources in their territory. The EA recommended that Chief and Council withhold TWN’s support for the TMEX proposal. Based on the recommendations, Chief and Council passed a resolution banning the project.⁹⁴

In May 2016, following the TWN EA, the NEB issued a report recommending that the federal government approve TMEX. The federal government followed the NEB’s recommendation. In August 2018, a Federal Court of Appeal quashed the federal government’s approval of TMEX.⁹⁵ However, in June 2019, the federal government re-approved the project. And in February 2020, the Federal Court of Appeal dismissed an appeal regarding the re-approval. The SCC declined to hear an appeal of the Federal Court decision.

As of the time of publication of the Toolkit, pipeline construction has continued as planned.⁹⁶

- ⁸⁹ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 246.
- ⁹⁰ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 246.
- ⁹¹ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 247.
- ⁹² Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 247.
- ⁹³ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227, at 248.
- ⁹⁴ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227, at 249-50.
- ⁹⁵ Canada Energy Regulator. September 2020. Project background. Canada Energy Regulator. <https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/trans-mountain-expansion/project-background.html#wb-cont>
- ⁹⁶ Rader, J. May 2020. Stop Trans Mountain: The First Nations’ movement against the Trans Mountain Expansion Project. Washington Environmental Council. <https://waconservationaction.org/stop-transmountain-the-first-nations-movement-against-the-trans-mountain-expansion-project/>

CASE STUDY

GITANYOW HEREDITARY CHIEFS DEVELOP ASSESSMENT PROCESS

The GWSAP requires all actors (e.g., companies, governments) to follow Gitanyow strategic direction, such as the *Gitanyow Lax'yip Land Use Plan*. The GWSAP also prohibits projects from accessing the *Lax'yip* without consent of the impacted *Wilp* (House). Everything in the GWSAP is Gitanyow-led to uphold *Ayookxw* and ensure *Wilp* sustainability.⁹⁸

The *Lax'yip* (territories) of the Gitanyow peoples are in the middle-Nass Watershed and upper Skeena Watershed, located along the western coast of what is now British Columbia.

In Gitanyow *Ayookxw* (law), Gitanyow hereditary Chiefs have the right and responsibility to possess, manage, protect and pass on the land and water of their territories sustainably from generation to generation.⁹⁷

At the start of 2021, the Gitanyow released their *Gitanyow Wilp Sustainability Assessment Process (GWSAP)*. The GWSAP sets out requirements for assessing proposed projects in Gitanyow *Lax'yip*.

The GWSAP follows Gitanyow *Ayookxw*. The GWSAP sets out the Gitanyow's own process for assessing new projects, and provides for Gitanyow monitoring, assessment and response for past and ongoing impacts on the *Lax'yip*.

97 West Coast Environmental Law. 2022. Environmental assessment. West Coast Environmental Law. <https://www.wcel.org/program/sharing-stories/environmental-assessment>

98 Marsden/Naxginkw, T., & Smith, G. April 2021. Indigenous law in action: Gitanyow launches its ground-breaking Wilp Sustainability Assessment Process. West Coast Environmental Law. <https://www.wcel.org/blog/indigenous-law-in-action-gitanyow-launches-its-groundbreaking-wilp-sustainability-assessment>

CASE STUDY

MOHAWK COUNCIL OF AKWESASNE'S EA PROCESS

The Mohawk Nation at Akwesasne straddles the United States and Canadian borders on both banks of the St. Lawrence River.⁹⁹ The Mohawk Council of Akwesasne (“MCA”), the Canadian arm, includes members from Kana:takon (Saint Regis, Quebec), Kawehno:ke (Cornwall Island, Ontario) and Tsi:Snaihne (Snye, Quebec).¹⁰⁰ On the American side, Akwesasne is represented by the Saint Regis Mohawk Tribe (“SRMT”).¹⁰¹

The MCA conducts its own EAs for projects on its lands. It has Mohawk EA officers and conducts around 30 EAs each year.¹⁰² MCA’s EA process is based on traditional teachings. The EA process uses the *Ohen:ton Karihwateh:kwen* (The Words That Come Before All Else) as its environmental framework, and *Sken:nen* (Peace), *Kasatstensera* (Power) and *Ka’nikonriio* (Good Mind) as its guiding principles.¹⁰³

Similarly, the SRMT conducts its own EAs. The SRMT EA process is based on looking ahead seven generations; being aware that there are limited resources available and ensuring that all resources are taken into account when considering a project.¹⁰⁴ The SRMT EA process incorporates the Thanksgiving Address and considers all things that Mohawk people are thankful for.¹⁰⁵ The theme of the Thanksgiving Address – “Now our minds are one” – is central to the EA process. SRMT believes that if that theme is considered in the EA process, all people will benefit, including proponents.¹⁰⁶

Sections of the Thanksgiving Address are quoted throughout the EA documents and guide the information that SRMT collects from proponents. For example, for the section on animals, the EA form quotes from the Thanksgiving Address: *“We give thanks and greetings to the animal life. They are still living in the forests and other places. They provide us with food and this gives us peace of mind knowing that they are still carrying out their instructions as given by the Creator. We therefore give greetings and thanks to our animal brothers. Now our minds are one.”* Applicants are then required to provide detailed information on animals observed at the site area, the habitat and forage at the site, and whether calving or birthing grounds are present.

⁹⁹ Quebec, Public Inquiry Commission on Relations Between Indigenous Peoples and Certain Public Services in Quebec. 2019. *Final report*. Ottawa: Library and Archives Canada, at 107.

¹⁰⁰ Akwesasronon, Mohawk Council of Akwesasne. 2018. *Annual Report: 2017-2018*. Akwesasronon: Mohawk Council of Akwesasne, at 6.

¹⁰¹ Saint Regis Mohawk Tribe. March 2022. *History of tribal government*. Saint Regis Mohawk Tribe. <https://www.srmt-nsn.gov/about/history-of-tribal-government>

¹⁰² Mohawk Council of Akwesasne Environment Program. <http://www.akwesasne.ca/environment/>

¹⁰³ Mohawk Council of Akwesasne Environment Program. <http://www.akwesasne.ca/environment/>

¹⁰⁴ Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

¹⁰⁵ Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

¹⁰⁶ Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

CASE STUDY

DOKIS FIRST NATION
DEVELOPS LAND CODE

The traditional territory of the Dokis First Nation (“Dokis”) is roughly 40,000 acres between what are now the Districts of Sudbury, Parry Sound and Nipissing.¹⁰⁷ Today, the Dokis reserve lands cover approximately 155 square kilometres of land southwest of Lake Nipissing on the French River. The reserve lands are composed of two large islands, with the main settlement located on the northern island called *Okikendawt* Island. The second island is a large Southern Peninsula that is generally used by the Dokis for hunting, fishing, camping and hiking.¹⁰⁸

In 2003, the Dokis signed on to the *Framework Agreement on First Nation Land Management*¹⁰⁹ and in 2013, the Dokis passed the *Dokis First Nation Land Management Code* (“Land Management Code”).¹¹⁰ Because the Dokis opted into the First Nations Land Management Act, and subsequently adopted its Land Manage-

ment Code, their reserve lands are no longer managed pursuant to the *Indian Act*.

The Land Management Code allows the Dokis to protect and respect the land and the gifts from the Creator, and states that the Dokis First Nation has the right to govern itself and has jurisdiction for Dokis land and resources.¹¹¹

Under the Land Management Code, the Dokis have the jurisdiction to conduct EAs for projects proposed on Dokis First Nation reserve lands. For example, recently, the Dokis assessed the environmental impact of expanding hydro services to new homes on reserve. The Dokis determined that the project would have negligible environmental impacts.¹¹²

107 Blacklaws, K. 2014. *Integrating the eagles: Members of Dokis First Nation reflect on public education in Ontario, 1960-1980*. North Bay: Nipissing University, at 7.

108 Dokis First Nation. March 2022. About Dokis F.N. Dokis First Nation <https://www.dokis.ca/history-of-treaties/>

109 Indigenous Services Canada. February 2022. *First Nations lands management*. Government of Canada. <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>

110 Indigenous Services Canada. February 2022. *First Nations lands management*. Government of Canada. <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>

111 Dokis First Nation. March 2022. *Dokis First Nation Land Management Code*. Dokis First Nation. <https://labrc.com/resource/land-codes/>

112 Impact Assessment Agency of Canada. November 2019. Dokis First Nation hydro line servicing. Government of Canada. <https://iaac-aeic.gc.ca/050/evaluations/proj/80259>

CASE STUDY

KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION ISSUES MINING MORATORIUM

Kitchenuhmaykoosib Inninuwig First Nation (KI) is a remote First Nation on the shores of Big Trout Lake, 500 kilometres northwest of what is now Thunder Bay. Big Trout Lake is a headwater lake that flows north into Hudson's Bay. KI's traditional territory encompasses much of this watershed.¹¹³

KI's relationship to the land is grounded in Kanawayandan D'aaki (keeping the land). According to KI spokesperson John Cutfeet, Kanawayandan D'aaki means protecting the land by respecting relationships with the land and animals.¹¹⁴

KI has developed a resource development protocol. The protocol indicates that KI is not opposed to development on its traditional lands but wishes to be a full partner in any development.¹¹⁵

When Platinex, a mining company, acquired mining claims on KI's traditional territory, Platinex had several meetings

with KI members, including the Chief, the Band Council and certain individuals. However, during these meetings, the KI consultation protocol was not followed.¹¹⁶

Per KI's protocol, development decisions require community agreement.¹¹⁷ As such, in 2004 and again in 2005, KI refused to sign an agreement with Platinex because KI's ongoing consensus was that exploratory drilling should not be permitted.¹¹⁸

Finally in 2005, on two separate occasions, KI informed Platinex that KI did not consent to any exploration on its traditional territory.¹¹⁹ Again in 2006, KI wrote to Platinex prohibiting them from conducting any exploratory drilling on KI territory.¹²⁰

In February 2006, KI became aware that their moratorium had not been respected and that Platinex had sent a drilling team to Nemeigusabins Lake.¹²¹

In response, the Chief and Deputy Chief hand-delivered a letter to Platinex's drilling crew demanding that Platinex cease all exploratory activities.¹²² After the Chief and KI members made radio announcements, crowds of KI members arrived at the camp.¹²³ Frightened by the KI presence, Platinex's drilling crew abandoned the site.¹²⁴ KI then decommissioned all of Platinex's drilling equipment.¹²⁵

- 113** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwig: Extraction and the role of law in KI's struggle for self-determination*. 7:1 *Contours*, at 2.
- 114** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwig: Extraction and the role of law in KI's struggle for self-determination*. 7:1 *Contours*, at 2.
- 115** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 19. eng/1327090675492/1611953585165
- 116** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 22. eng/1327090675492/1611953585165
- 117** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 21.
- 118** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 22.
- 119** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 23 and 25.
- 120** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 30.
- 121** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 32.
- 122** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 33.
- 123** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 34.
- 124** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 37.
- 125** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 40.

CASE STUDY

Platinex sued KI for \$10 billion in damages and gained an injunction to remove KI from the exploration site.¹²⁶ KI responded, seeking an injunction against Platinex – meaning that they asked the court to order that Platinex stop all exploration and mining activities on their lands because those activities stood to cause irreparable harm to KI, harm that could not be compensated through money or damages. At the injunction hearing, the judge sided with KI and ordered Platinex to halt all activities until consultation was undertaken.¹²⁷ The judge found that Platinex’s drilling activities would have an irreparable harm on KI’s existing treaty land entitlement claim.¹²⁸

However, in October 2007, a judge ordered that KI allow Platinex onto the land for specific drilling.¹²⁹ KI publicly stated that they would not allow Platinex onto their land.¹³⁰

Platinex then asked the court to allow it to start drilling and to order that KI not prevent the drilling. The judge made the order as requested.¹³¹

KI then made public statements that it would not allow Platinex onto their territory. In response to the statements, Platinex brought KI to court again. The court found the Chief and five Councillors in contempt of court. The Chief explained that he did not mean to disrespect the court, but that KI had to follow their own law. In March 2008, the

judge sentenced the Chief and Councillors to six months in jail.¹³²

KI held a rally along with Ardoch Algonquin First Nation and Grassy Narrows First Nation (who were fighting similar encroachments). The Court of Appeal overturned the Chief and Councillors’ sentence on the basis that the sentences were too harsh for a few reasons, including that the protests had been peaceful and for a limited purpose.¹³³

Following the Court of Appeal decision, Platinex tried to access their mining claims once more. People from KI went out to Nemeigusabins Lake and circled in boats and canoes, preventing the floatplane from landing. Platinex then sued Ontario for damages, eventually settling for a \$5 million payout and a guarantee of future royalties if a mine was ever built. Finally, Ontario withdrew the area of Platinex’s former claims, so it is not available for mining.¹³⁴

126 Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 3.

127 *Platinex Inc. v. Kitchenuhmaykoosib Inninuug First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 138-39.

128 *Platinex Inc. v. Kitchenuhmaykoosib Inninuug First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 79.

129 Bigué, A. & Hudon, M-A. 2008. Aboriginal protest against mining exploration: The paramountcy of the rule of law. 3:2 *Bus L Quarterly*, at 29.

130 Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 4.

131 Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 4.

132 *Platinex Inc. v. Kitchenuhmaykoosib Inninuug First Nation*, 2008 ONCA 533 (CanLII), <https://canlii.ca/t/1z9q0> at para 1.

133 *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (CanLII), <https://canlii.ca/t/1z9q1> at para 69.

134 Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 6.

CASE STUDY

MI'KMAQ AND ALTON GAS

Nova Scotia conducted an EA of the project. As part of the EA, a Mi'kmaq Ecological Knowledge Study (“MEKS”) was conducted in December 2006. The MEKS strongly recommended that Alton Gas and Nova Scotia meet with Mi'kmaq leadership because “the likelihood of infringements on Mi'kmaq use activities is highly possible.”¹³⁹ Despite the MEKS, in 2007, the Nova Scotia Minister responsible for the EA issued an EA approval with conditions related to a monitoring program for fish and fish habitat.¹⁴⁰

Between 2007 and 2014, Nova Scotia undertook to consult with SFN through the Assembly of Nova Scotia Mi'kmaq Chiefs' negotiating body – Kwilmu'kw Maw-klu-suaqn Negotiation Office (“KMKNO”).¹⁴¹ In 2013, SFN left KMKNO and began negotiating with Nova Scotia directly.¹⁴²

In 2014, the Nova Scotia Department of Environment wrote to SFN informing them that project construction would begin after the project received the remaining regulatory approvals.¹⁴³ SFN responded that “the Band has never been properly and adequately engaged in meaningful consultations with these matters, nor has any consent, informed, or otherwise, as to the operation of these projects been given.”¹⁴⁴

Then the construction started. A wave of protests erupted in response.

Since time immemorial, Mi'kmaq communities have known the Sipekne'katik River as their expressway, as a source of food and medicines, and as a significant part of the Mi'kmaq cultural identity. Sipekne'katik First Nation (“SFN”) is one Indian Act band formed from the Mi'kmaq people.¹³⁵

Alton Gas, a Calgary-based company, wanted to undertake a project on SFN's traditional territory. The project would create two underground salt caverns, each the size of an office building, to store natural gas.¹³⁶ Flushing the caverns would create an enormous amount of salt brine wastewater, which Alton Gas would dump into the Sipekne'katik River.¹³⁷ Dumping salt brine wastewater would place the ecosystem at risk, which would impact the inherent and treaty rights of Mi'kmaq peoples to access and use the river for food, livelihood and ceremony.¹³⁸

135 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 18.

136 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 10.

137 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 13.

138 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 95. Inninuwig First Nation, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 40.

139 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at paras 15-18.

140 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 21.

141 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 19.

142 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl>.

143 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 24.

144 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 25.

- 145** Vandervoorde, A. 2019. *Changing culture, changing world: A gramscian approach to ontologies in radical environmental movements*. Vienna: Universitat Wien, at 27.
- 146** Withers, P. October 2014. \$100 million Alton gas project delayed over Mi'kmaq concerns. *CBC News*. <https://www.cbc.ca/news/canada/nova-scotia/100-million-alton-gas-project-delayed-over-mi-kmaq-concerns-1.2817335>
- 147** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 46.
- 148** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 47.
- 149** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 48.
- 150** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 49.
- 151** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 261.
- 152** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 260.
- 153** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 164.
- 154** Alta Gas. October 2021. Alton Natural Gas storage project update. Alton Gas. <https://altonnaturalgasstorage.ca/>

CASE STUDY

The Mi'kmaq slowed traffic near a major highway calling attention to the river's cultural and political value. Non-Indigenous allies added their voices to the Mi'kmaq. For example, the Shubenacadie River Commercial Association, the Striped Bass Association, East Hants Fracking Opposition Group, Ecology Action Centre, Council of Canadians, Amnesty International and many others all spoke out in support of SFN.¹⁴⁵

Due to the outrage, the Nova Scotia government halted part of the construction work until Alton Gas carried out further consultation with SFN.¹⁴⁶

Then, in 2016, the Nova Scotia Department of Environment issued final approvals to Alton Gas.¹⁴⁷ SFN appealed the decision,¹⁴⁸ but the Minister rejected the appeal.¹⁴⁹ So SFN appealed to the Nova Scotia courts.¹⁵⁰

While SFN was appealing the decision, SFN members held a demonstration against the project in front of the Nova Scotia Legislature.¹⁵¹ Joined by non-Indigenous allies, SFN also organized highway blockades, a development site encampment and educational events about the project.¹⁵² The Supreme Court of Nova Scotia reversed Nova Scotia's decision that the project could go ahead and ordered that the Crown conduct more consultation with SFN.¹⁵³

In 2021, Alton Gas announced that it would not continue development and that it plans to decommission the project in consultation with the Mi'kmaq. Alton Gas stated that “the project has received mixed support, challenges and experienced delay.”¹⁵⁴

REFERENCES

See the References & Resources Module for a full list of references to this section.

Developing Your Own TK Protocol

SUPPLEMENTARY
TOOLS & RESOURCES

01



INTRODUCTION

This section in the Traditional Knowledge (TK) Module offers you guidance for how to develop your own TK protocol, based on similar initiatives taken by other Indigenous peoples in Canada (First Nations, Inuit and Métis). Ideally you would have a TK protocol already in place before being approached by external interests for your knowledge. Developing a TK protocol ensures that you are in a position to assess the risk and benefit of sharing your knowledge as part of a public impact assessment process.

It is important for you to convey or define your own concept of TK. It will not be the same as proponents' or governments' ideas of what this knowledge is. It is also important to represent your TK in your own language. It is important to represent your knowledge according to your own Nation's cultural understanding, and ideally in your own language.

Note in this section, TK and IK (Indigenous knowledge) are used interchangeably. Both terms are used in Canada. TK is term often used in the United Nations Declaration on the Rights of Indigenous peoples. IK is the term used in the Impact Assessment Act and other federal legislation.

EXISTING CULTURAL PROTOCOLS

Most communities and organizations have existing cultural protocols or guidance for how to work with TK holders or with the knowledge itself. This includes how to treat Elders/TK holders respectfully and compensate them for their time. Most First Nations already know these things, but they have not been codified or documented here in a protocol or guide. You can fully expect that interests who are seeking your knowledge (governments, industry, etc.) do not know about these things or are ill-informed. Part of the purpose of developing your own protocol is to assist you in the codification and documentation of protocols that you already know about and practise in your community. The TK protocol simply helps you to write it down so it can serve as a guide for how you expect others to respect your knowledge and TK holders.

SOURCES OF KNOWLEDGE

This template offers key clauses that are included in other TK protocols/guides developed by Indigenous peoples. Some text/clauses come from guidance offered by Indigenous organizations (e.g., the former National Aboriginal Health Organization, or NAHO) and international organizations (e.g., World Intellectual Property Rights Organization). The priorities and focuses are on Indigenous-developed protocols in Canada.

Federal and provincial government-generated protocols were not included, although it is recommended you become familiar with them.

All material generated in this protocol came from public sources. Unfortunately, some of the protocols that clauses/text are drawn from are no longer publicly available, or are from an organization that no longer exists (such as NAHO) although some of their materials can still be found. We have tried to focus on those protocols that you can find on your own if you wish to read the full document. For those no longer publicly available, the First Nation or organization is noted in case you want to contact them on your own.

SELECTION OF TEXT/CLAUSES

The text/clauses included in this template are key clauses based on an analysis of existing protocols and identifying key/core elements. The list is not exhaustive, and you may wish to include other clauses that are important to you. For example, you may wish to state that Traditional Knowledge must be valued on par with western science, or you may wish to indicate explicitly that your protocol will be the one to be followed in any EA process. You may also explicitly state that undertaking a TK study in your territory does not constitute consultation, accommodation or consent,

although the study can inform such processes. Every Indigenous protocol is different, depending on the priorities, needs and capacities of the community or organization, yet all Indigenous protocols contain several key elements.

HOW TO USE THE TK PROTOCOL TEMPLATE

The template contains various protocol clauses/texts that are grouped according to topic. For example, each identified clause/text of the template “*Role and Function of a TK Advisory Committee*” provides several examples of text/clauses as a reference for you to develop your own content. Each topic provides you with ideas to consider including in your own protocol. Each protocol developed by other Indigenous peoples has different priorities and ways they choose to protect their knowledge. You will have to decide what works best for your community or organization. The template in this Module offers the basic structure but does not include any practices or cultural protocols that are specific to your Nation, community or organization. The text/clauses in the table below are directly cited from the source indicated at the end of each example, some of which are publicly available and can be found in the References & Resources Module.

DEVELOPING YOUR OWN TK PROTOCOL/GUIDE

Developing your own protocol involves more than preparing text/clauses and including them in a written document. It is a process that involves your community and requires community approval of the final protocol document. In this way it is somewhat similar to using the TK studies as part of the EA process. You must decide how the protocol and guide will be governed and administered in your community or organization. You will see in the template how different First Nations and organizations have chosen to take on this task. Engaging the community – especially knowledge holders – is critical to ensure cultural protocols are accurate and reflect how knowledge holders wish to be *respected and protected*. If your community already has existing practices around obtaining consent from political leadership, these should be codified in the TK protocol.

The first step is to determine which aspects of a TK protocol already exist in the community or organization. Sometimes these are already written down, sometimes not. Codifying existing practices is important and is a good place to start when developing your own protocol. Many communities are in the process of revitalizing TK knowledge and language, and thus have existing processes to do so.

What is very different about the template offered in this module is the emphasis on protecting your knowledge from external interests such as proponents and governments. If these protections are not in place, the information could be misused, or used against you in the future. Traditional knowledge was intended to ensure the well-being of the natural world/environment, the people and future generations.

See the References & Resources Module for a list of references, and to learn more about where to find more information on TK protocols and guidance documents. The section will note documents that are currently publicly available.

Traditional Knowledge Protocol Topics

TOPIC	PAGE NUMBER
Defining TK. Convey your own concept of TK, ideally using your own language and concepts.	10
Protecting rights. TK studies can assist the First Nation in protecting their rights and way of life.	11
First Nation protocol takes precedence. Governments and others are developing their own TK protocols. Indicate in your protocol that your protocol is the one that proponents, governments and others will follow.	12
TK studies, research or work are not to be interpreted as “duty to consult.” Conducting a TK study does not replace the duty to consult with a First Nation.	12
Respecting Traditional Knowledge as on par with western science. Ensure that TK is not relegated as “add on” knowledge as part of an EA process, but is valued and respected.	14
Establishing a TK Advisory Committee for the purposes of gathering and documenting TK for TK studies, land use studies and environmental assessments.	15
Role and function of a TK Advisory Committee. What kind of decisions will this committee make? How will such a committee function? Who should be on this committee?	17

Traditional Knowledge Protocol Topics

Continued

TOPIC	PAGE NUMBER
<p>Scope of TK protocols. Indicate what the studies will and will not cover, what Traditional Knowledge external people will be allowed to access, that ancestor remains and grave goods can be off limits, etc.</p>	19
<p>Ownership of TK. How do various TK protocols make clear that TK belongs to the community? What is the purpose of owning TK? What are the legal mechanisms by which TK is owned? (Contracts with external study participants? Intellectual property?)</p>	21
<p>Gaining approval/consent from the community to document and gather TK. What kind of information does the community require to authorize?</p>	24
<p>Gaining consent from the community and leadership. Leadership consent is required first and then individual consent (TK holders, Elders, etc.). It is important to stipulate leadership consent is required.</p>	25
<p>Gaining consent for access to individual's knowledge from individual TK holders, practitioners, Elders, community members. This must be free, prior and informed consent.</p>	26
<p>Benefit to the community. How shall the proponent demonstrate benefit to the community?</p>	28
<p>Sharing and Use of TK. How will information be shared with the community after the project is completed?</p>	29

Traditional Knowledge Protocol Topics

Continued

TOPIC	PAGE NUMBER
<p>Administration of the protocol. How will the protocol and its provisions be monitored and enforced? What are the responsibilities of this organization? What happens if the study agreement is violated?</p>	32
<p>Procedures of gathering, documenting TK. What are appropriate methods, procedures and processes to ensure TK is collected ethically in the community? Who is involved in the processes?</p>	35
<p>How can community influence the design and methodology of research involving their TK? (related to the above). Step-by-step instructions on how to structure the methodology of the study. Also covered in the above section: “Procedures of gathering, documenting TK.”</p>	39
<p>Data verification and interpreting data. Procedures for verifying with community, information that was gathered. Community involvement in interpreting the information.</p>	41
<p>Confidentiality (of people who shared the knowledge or location of the knowledge such as sacred sites, burial sites, species at risk). Is there any reference to confidentiality in the TK protocols?</p>	43
<p>Compensation. How will TK holders be compensated for their time? The compensation is not for their knowledge but for their time. The holders of the knowledge and communities retain ownership.</p>	45

Traditional Knowledge Protocol Topics

Continued

TOPIC	PAGE NUMBER
Recognition of TK holders. How should TK holders be given recognition for their contributions and time?	46
Intellectual property rights. What are they and how will they be protected? (Heavily overlaps with the section “Ownership of TK.”)	47
Storage and management of TK. How will TK be stored and managed in the community? How do communities ensure they maintain control over access to TK (even though it may be shared externally)?	48
Community engagement throughout TK study/project. How will community be kept informed of study/project progress? How will community be engaged? How will the final product be reported back to the community?	51
Promotion of TK. How will TK be used for other community goals (education for youth, adults; cataloging information for the Nation, etc.)	52
How will TK study/project findings be shared? How will the community be informed of study findings?	53
Formal agreements/data sharing agreements. Are there examples of where it is necessary to have agreements? What are samples of these types of agreement? When would they be used?	54

Traditional Knowledge Protocol Topics

Continued

TOPIC

PAGE
NUMBER

Conflict resolution. How will disagreements regarding the administration, management and implementation of TK protocol be resolved?

55

Cultural protocols. How are appropriate cultural protocols in gathering information and norms in communication made a requirement? E.g., how are language barriers navigated? How are the differences between western science and TK treated?

55

Amendments – Living document. How can the TK protocol document be amended over time/updated?

56

Table of Clauses

NOTE

All URLs listed below were active at the time of writing this publication. If any URL listed below is no longer active, search the document's name online, or contact the organization directly.

SECTION AND PURPOSE

Defining TK,
ideally using your
own language and
concepts.

SAMPLE TEXT

Example 1 Under Glossary of Terms:

'NBMIK' or 'MIK' refers to Indigenous Knowledge of the New Brunswick Mi'gmaq. This includes the collection and adaptation of knowledge that Mi'gmaq hold in accord with all components of the natural environment and the interrelationships that exist between all Creation (animate and inanimate matter); therefore *m'st no'gmaq* (all my relations) (p. 8).

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. 2016. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

Example 2

Mi'kmaw cultural tradition, the concept of *Netukulimk* – a concept which includes the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community at large. *Netukulimk* also encompasses ecological beliefs through the interplay of collective and individual responsibilities of the Mi'kmaq to the natural world. Such relationships with the land are holistic in nature and consider many aspects of the natural and spiritual world (p.6).

Source: *Assembly of Nova Scotia Mi'kmaq Chiefs. 2007. Mi'kmaq Ecological Knowledge Study Protocol*. <https://www.gcseglobal.org/sites/default/files/inline-files/mikmaq-ecological-knowldege-study-protocol.pdf>

SECTION AND PURPOSE

Defining TK,
ideally using your
own language and
concepts.

SAMPLE TEXT

Example 3

In the preamble, the Sambaa K'e Dene Band defined traditional knowledge in the following article:

Therefore be it Resolved that the Sambaa K'e Dene Band will take all steps necessary to ensure that all land use and resource development activities in the Sambaa K'e traditional land use area incorporate yúndíit'ōh (traditional knowledge) at all phases of development -- including research and planning, project implementation, ongoing project monitoring, and closure / remediation – according to the principles and procedures identified in this policy document.

Source: *Sambaa K'e Dene Band Policy Regarding the Gathering, Use and Distribution of Yúndíit'ōh (Traditional Knowledge)*. 2003. <https://nwtresearch.com/sites/default/files/sambaa-k-e-dene-band.pdf>

Protecting rights.

IK/TK studies can
assist First Nation
in protecting their
rights and way
of life.

Example 1

The New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide, under “NBMIKS Trigger,” states:

The requirement for a NBMIKS is triggered the moment the Crown contemplates a decision that may impact the inherent, Aboriginal and Treaty Rights, Title or rights under international law of the Mi'gmaq in New Brunswick. The MTI [Mi'gmawe'l Tplu'taqnn Inc.] and other relevant First Nation organizations will be contacted at this point, pursuant to the Interim Consultation Protocol between MTI, the federal Crown and provincial Crown, and pursuant to the Crown's legal obligations.

The NBMIKS Committee will review correspondence relating to the potential Project. Subsequent meetings with the Proponent may be requested if additional information is required. Based on its understanding of the proposed Project, the NBMIKS Committee will determine the scale of MIKS needed to effectively assess potential impacts to Mi'gmaq Rights within New Brunswick, and the relevant resources needed to complete this work (p. 10).

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. 2016. <https://ethicshub.ca/wp-content/uploads/2020/05/56-New-Brunswick-Mi%E2%80%99gmaq-Indigenous-Knowledge-Study-NBMIKS-Process-Guide.pdf>

SECTION AND PURPOSE

SAMPLE TEXT

Protecting rights.

IK/TK studies can assist First Nation in protecting their rights and way of life.

Example 2

3.1 New Brunswick Mi'gmaq Indigenous Knowledge Study Process Guide was established to assist it protect and advance Mi'gmaq rights and interests.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. 2016. <https://ethicshub.ca/wp-content/uploads/2020/05/56-New-Brunswick-Mi%E2%80%99gmaq-Indigenous-Knowledge-Study-NBMIKS-Process-Guide.pdf>

First Nation protocol takes precedence.**Example 1**

3.3 This MTK [Maliseet Nation Traditional Knowledge] Protocol is intended to complement and support the operation of the Maliseet Research Review Board (MRRB), that pertains to MTK data collection and, in the event of a conflict between this protocol, and any other guidelines or laws, the guidelines in this Protocol, including the Maliseet Ethics Guidelines, shall take precedence.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

TK studies, research or work are not to be interpreted as “duty to consult” or as meeting legal obligations to consult.**Example 1**

3.1 Nothing in this MTK [Maliseet Nation Traditional Knowledge] Protocol or any related discussions, communications or documentation shall be interpreted as to abrogate, derogate, or in any way, affect, limit or detract from the Aboriginal, Treaty or Title rights of any member of the Maliseet Nation.

3.2 Nothing in this document shall be interpreted as Consultation for the purpose of justifying an infringement on Maliseet Aboriginal, Treaty or Title rights, or as satisfying the duty to consult and accommodate the Maliseet Nation, unless otherwise provided for in writing and sanctioned by Maliseet Nation Leadership.

3.3 This MTK Protocol is intended to complement and support the operation of the Maliseet Research Review Board (MRRB), that pertains to MTK data collection and, in the event of a conflict between this protocol, and any other guidelines or laws, the guidelines in this Protocol, including the Maliseet Ethics Guidelines, shall take precedence.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

SECTION AND PURPOSE

TK studies, research or work are not to be interpreted as “duty to consult” or as meeting legal obligations to consult.

SAMPLE TEXT

Example 2

A key point in this protocol document is that the content of community protocols should not replace community consultation protocols. See page 11 of the New Brunswick Mi’gmaq Indigenous Knowledge Study (NBMIKS) Guide V.3:

For greater certainty nothing in this document shall be interpreted as Consultation, as it is described by the Supreme Court of Canada in a series of constitutionally significant decisions. The rights that Indigenous Peoples hold are fundamental to the constitution and the foundations of Canada. The Mi’gmaq as an Indigenous People, who hold constitutional and legal rights, are clearly distinguishable from stakeholders.

Source: *New Brunswick Mi’gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.3.* <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

Example 3

3.1 Nothing in this MTK [Maliseet Nation Traditional Knowledge] Protocol or any related discussions, communications or documentation shall be interpreted as to abrogate, derogate, or in any way, affect, limit or detract from the Aboriginal, Treaty or Title rights of any member of the Maliseet Nation.

3.2 Nothing in this document shall be interpreted as Consultation for the purpose of justifying an infringement on Maliseet Aboriginal, Treaty or Title rights, or as satisfying the duty to consult and accommodate the Maliseet Nation, unless otherwise provided for in writing and sanctioned by Maliseet Nation Leadership.

3.3 This MTK Protocol is intended to complement and support the operation of the Maliseet Research Review Board (MRRB), that pertains to MTK data collection and, in the event of a conflict between this protocol, and any other guidelines or laws, the guidelines in this Protocol, including the Maliseet Ethics Guidelines, shall take precedence.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol).* https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

SECTION AND PURPOSE

Respecting TK as on par with western science.

Ensure that TK is not relegated as “add on” knowledge as part of an IA process, but is valued and respected

SAMPLE TEXT

Example 1

Research and other activities that utilize both yúndíit’óh and a western scientific component must include training, so that Smbaa K’e Dene Band members can learn to use and apply western approaches and technology to the gathering and use of land and resource information.

And

Traditional Knowledge will be subject to Traditional Knowledge quality controls and scrutiny, not Western Science quality controls and scrutiny:

- Yúndíit’óh is derived from a traditional process of intuition, observation, testing, and validation and is of equal value to western scientific processes.

Source: *Smbaa K’e Dene Band Policy Regarding the Gathering, Use and Distribution of Yúndíit’óh (Traditional Knowledge)*. 2003. <https://nwtresearch.com/sites/default/files/smbaa-k-e-dene-band.pdf>

Example 2

Part of the guiding principles of the Gwich’in Tribal Council Traditional Knowledge Policy (2004) states:

Ensures respect for Gwich’in Traditional Knowledge holders and ethical use of Gwich’in Traditional Knowledge in research, giving it an equal standing with western scientific knowledge.

Source: *Gwich’in Tribal Council. 2004. Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

SECTION AND PURPOSE

Establishing a TK Advisory Committee

for the purposes of gathering and documenting TK for TK studies, land use studies, environmental assessments.

The TK Advisory Committee should be established by the Nation. The role of the committee is also covered in the following section. This section also includes text that addresses the composition of TK Advisory Committees.

SAMPLE TEXT

Example 1**1.1. The purpose of this Protocol is:**

- a.** to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol; and
- b.** to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context” (p. 7).

Source: ARIPO. African Regional Intellectual Organization. 2010. *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*. <https://www.ceja.ch/images/CEJA/DOCS/Bibliotheque/Legislation/Africaine/Textes%20Communautaires/BC/BC6.pdf>

Example 2

2.1 The Akwesasne Task Force on the Environment (ATFE) has established a Research Advisory Committee Review (RAC) to review and comment on all proposals that involve environmental and/or scientific research to be conducted in the Mohawk Nation community of Akwesasne. Due to the increased number of research projects being proposed by scientists, it has become necessary to establish guidelines to protect the community of Akwesasne and its future generations.

Source: Akwesasne Task Force on the Environment. 1996. *Protocol For Review of Environmental and Scientific Research Proposals*. https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/resources/atfe_protocol_0.pdf

Example 3

The Maliseet Nation (Wolastoqwik) Traditional Knowledge (MTK) Protocol for the roles and responsibilities of the Maliseet Nation Conservation Council regarding traditional knowledge protocols:

Phase I – Project Planning

4.2 The MNCC [Maliseet Nation Conservation Council] will act as the central agency responsible for the administration and oversight of all stages of the MTK Protocol, including planning and initiation. MNCC will advise the Consultant on communications strategy in order to effectively provide information on each Project, Consultants and Proponents, MTK processes, and gather feedback. MNCC shall act as the contact organization for MTK studies taking place in the traditional territory of the Maliseet Nation.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

SECTION AND PURPOSE

Establishing a TK Advisory Committee

for the purposes of gathering and documenting TK for TK studies, land use studies, environmental assessments.

The TK Advisory Committee should be established by the Nation. The role of the committee is also covered in the following section. This section also includes text that addresses the composition of TK Advisory Committees.

SAMPLE TEXT

Example 4

3.1 New Brunswick Mi'gmaq Indigenous Knowledge Study Process Guide: Mi'gmaq Sagamaq Mawiomi [Gathering of Mi'gmaq Chiefs] was formed in September 2015 in order to promote a strong unified voice for the Mi'gmaq People in New Brunswick. The Mi'gmaq Sagamaq Mawiomi established Mi'gmawe'l Tplu'taqnn Incorporated in November, 2015 to assist it protect and advance Mi'gmaq rights and interests.

This New Brunswick Mi'gmaq Knowledge Study Process Guide ('Guide') was developed with the valuable support of Wolastoqiyik and Mi'gmaq Elders and knowledge holders. This Guide is intended to provide guidance in the initiation, timing and execution of Indigenous Knowledge Studies within New Brunswick.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

SECTION AND PURPOSE

Role and function of a TK/IK Advisory Committee.

What kind of decisions will this committee make? How will such a committee function? Who should be on this committee?

SAMPLE TEXT

Example 1

The Gwich'in Tribal Council: The Gwich'in, as represented by the Gwich'in Tribal Council (GTC), are the holders of Gwich'in Traditional Knowledge (TK) in and around the Gwich'in Settlement Area (GSA).

Roles and Responsibilities:

- a. Represent membership on all matters that will impact the rights of the Gwich'in People, including the issue of protecting and promoting Gwich'in TK
- b. Responsible for ensuring that the cultural and economic relationships between the Gwich'in and government recognize the Gwich'in way of life
- c. Negotiating self-government arrangements on matters including culture, heritage and language
- d. The Gwich'in Tribal Council was authorized "to develop a policy on Gwich'in Traditional Knowledge research that would bring clarity to Gwich'in ownership and control of Gwich'in Traditional Knowledge

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Example 2

Mi'kmaw Ethics Watch: The Research Principles and Protocols provides a prescribed approval process for the collection, analysis and reporting of research data generated from Mi'kmaq First Nation communities throughout the province of Nova Scotia.

Roles and Responsibilities:

- a. Any research, study, or inquiry into collective Mi'kmaw knowledge, culture, arts, or spirituality which involves partnerships in research shall be reviewed by the Mi'kmaw Ethics Watch (p. 17).
- b. The Mi'kmaq Ethics Watch (Committee, etc.) shall conduct a fair and timely review of all research conducted among Mi'kmaq people and shall maintain control over all research processes (p. 17).
- c. List of Mi'kmaw Ethics Watch Obligations found on page 20

Source: *Mi'kmaq Ecological Knowledge Study Protocol*. <https://ethicshub.ca/wp-content/uploads/2020/05/4-Mi%E2%80%99kmaq-Ecological-Knowledge-Study-Protocol.pdf>

A Mi'kmaq Ethics Committee has been appointed by the Sante' Mawio'mi (Grand Council) to establish a set of principles and protocols that will protect the integrity and cultural knowledge of the Mi'kmaw people. These principles and protocols are intended to guide research and studies in a manner that will guarantee that the right of ownership rests with the various Mi'kmaw communities.

SECTION AND PURPOSE

Role and function of a TK/IK Advisory Committee.

What kind of decisions will this committee make? How will such a committee function? Who should be on this committee?

SAMPLE TEXT

These principles and protocols will guarantee only the highest standards of research. Interpretation and conclusions drawn from the *research will be subject to approval to ensure accuracy and cultural sensitivity.*

Source: Mi'kmaw Ethics Watch. <https://www.cbu.ca/indigenous-initiatives/mikmaw-ethics-watch/>

Example 3

The Research Advisory Committee (min. 5 members selected via consensus decision of the Akwesasne Task Force on the Environment) reviews and comments on all proposals that involve environmental and/or scientific research, whereby, the Akwesasne Task Force on the Environment is consulted and provided recommendations from the Advisory Committee on all projects or activities. The Research Advisory Committee ensures that: proposed research benefits the community; gives the people of Akwesasne an opportunity to be involved in decision making processes and empowers those involved through education, training and/or authorship.

Source: Akwesasne Task Force on the Environment. *Protocol for Review of Environmental and Scientific Research Proposals.* https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/resources/atfe_protocol_0.pdf

Example 4

The role of the Maliseet Nation Conservation Council (MNCC) when conducting Maliseet Traditional Knowledge studies:

4.7 Role of the MNCC in phase II activities:

The MNCC shall act as to increase Maliseet involvement in MTK [Maliseet Nation Traditional Knowledge] Studies from a training and implementation standpoint. The role of the MNCC in Phase II activities includes, but is not limited to, the following:

- Hiring, advising and/or guiding project manager;
- Working with project manager to set clear goals and budgets;
- Where appropriate, participating in project management, including acting as project manager and developing Maliseet research capacity;
- Acquiring informed consent of project participants;
- Assisting in finding solutions to problems and resolving conflicts;
- Responding to regular project reporting from the study team about progress, schedules, emerging issues and financial considerations;

SECTION AND PURPOSE

Role and function of a TK/IK Advisory Committee.

What kind of decisions will this committee make? How will such a committee function? Who should be on this committee?

SAMPLE TEXT

- Developing a process to ensure the project manager and team members expend funds according to the budget;
- Administering funds with full accountability to the community for how the money is spent;
- Communicating frequently with the community and those who are providing the financial support regarding the goals and value of the study as well as its progress;
- Arranging funding and co-operative partnerships;
- Facilitating the participation of Maliseet communities;
- Preparation of communications strategy and materials;
- Preparation of communications materials such as newsletters, news releases, wall displays for public buildings;
- Developing public educational materials related to the project;
- Preparing letters and other correspondence to appropriate leaders, Chiefs and Councils, Tribal Councils and other relevant parties;
- Initiating discussions on benefit sharing.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

Scope of IK protocols.

Indicate what the studies will and will not cover, what Indigenous knowledge external people will be allowed to access (e.g. ancestor human remains can be off limits).

Example 1**Sambaa K'e Policy Regarding Yúndíit'õh Principles includes aspects for the use of TK to outside agencies:**

Yúndíit'õh belongs to the Sambaa K'e Dene as a whole and is therefore a collective responsibility. Decisions concerning what Yúndíit'õh information to share with outside agencies must be made through a community process, with the full and active involvement of the elders.

Ownership and copyright of all Sambaa K'e yúndíit'õh remains with the community as a whole, as represented by the Sambaa K'e Dene Band, and may only be gathered and used by outside agencies for specific purposes under a Yúndíit'õh Research Agreement and with the permission of the community.

SECTION AND PURPOSE

Scope of IK protocols.

Indicate what the studies will and will not cover, what Indigenous knowledge external people will be allowed to access (e.g. ancestor human remains can be off limits).

SAMPLE TEXT

Yúndíit'ōh gathered for the use of outside agencies must be summarized in a plain language report (in English) and on audio tape (in Dene Yatie) and must be reviewed and ratified by the Samba K'e Dene Band before being released.

Source: *Samba K'e Policy Regarding Yúndíit'ōh*. <https://nwtresearch.com/sites/default/files/samba-k-e-dene-band.pdf>

Example 2

See page 12 of the *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Guide V.3*:

Phase I NBMIKS Scoping & NBMIKS Description

Depending on the issues giving rise to the duty to consult, the Crown or formally delegated proponent or entity will provide Mi'gmawé'l Tplu'taqnn with a description of a proposed project. Mi'gmawé'l Tplu'taqnn will in turn subsequently provide a full description of the NBMIKS to the relevant body.

NBMIKS Area Scoping

NBMIKS scoping will be informed and made possible as a result of the knowledge garnered through the desktop literature review. When determining a study's geographical area, Mi'gmawé'l Tplu'taqnn shall take into account the nature of NBMIK data, which demands the following:

- NBMIK data is continuously evolving and therefore any NBMIKS will require use of the most recently approved version of the NBMIKS Guide;
- Collection of NBMIK data will cover an area beyond the proposed Project footprint as determined in the initial research scoping of the NBMIKS Area;
- Collection of information about Mi'gmaq use and occupation of lands and waters must recognize and describe their importance to Mi'gmaq cultural and spiritual beliefs and practices;
- Describe the significance of the inclusion and recognition of Mi'gmaq historical, spiritual and cultural information in the proposed study;

SECTION AND PURPOSE

Scope of IK protocols.

Indicate what the studies will and will not cover, what Indigenous knowledge external people will be allowed to access (e.g ancestor human remains can be off limits).

SAMPLE TEXT

- The final dimension of Project scoping is a very important step, the identification and employment of Mi'gmaq Community Researchers. In some cases, it will be necessary for Mi'gmawé'l Tplu'taqnn to train Mi'gmaq Community Researchers. If training of Mi'gmaq Community Researchers is required, the cost of this training will be included in the budget submitted for funding the NBMIKS."

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.3.* <https://ethicshub.ca/wp-content/uploads/2020/05/56-New-Brunswick-Mi%E2%80%99gmaq-Indigenous-Knowledge-Study-NBMIKS-Process-Guide.pdf>

Ownership of TK.

How do various TK protocols make clear that IK belongs to the community? What is the purpose of owning IK? What are the legal mechanisms by which IK is owned? (Contracts with external study participants? Intellectual property?) Example 4 also provides sanctions should violations of the protocol occur.

Example 1 Purpose

A common theme with the obtaining and application of TK was ensuring intellectual property rights were not violated and that individuals who shared knowledge retained ownership of that knowledge.

A First Nation Community retains ownership and control over Aboriginal Knowledge and its interpretation. A community will have full access to any documents and research that includes its Aboriginal Knowledge (p. 5).

Source: *Assembly of First Nations. First Nations Ethics Guide on Research and Aboriginal Traditional Knowledge.* https://achh.ca/wp-content/uploads/2018/07/Guide_Ethics_AFN.pdf

Example 2 Ownership, Control, Access and Possession (OCAP)

The Principle of Ownership is defined as: "the relationship of a First Nations community to its cultural knowledge/data/information. The principle states that a community or group owns information collec-

SECTION AND PURPOSE

Ownership of TK.

How do various TK protocols make clear that IK belongs to the community? What is the purpose of owning IK? What are the legal mechanisms by which IK is owned? (Contracts with external study participants? Intellectual property?) Example 4 also provides sanctions should violations of the protocol occur.

SAMPLE TEXT

tively in the same way that an individual owns their personal information. It is distinct from stewardship [or possession] (p.4).

Source: First Nations Information Governance Center. *The First Nations Principles of OCAP*. <https://fnigc.ca/what-we-do/ocap-and-information-governance/>

Example 3

Through this shared stewardship, Dehcho First nation(s) are the primary guardians, protectors and interpreters of Traditional Knowledge. Dehcho First Nation(s) require informed consent prior to outside agencies, Industry, government, researchers, or other interested parties receiving access to any documented Dehcho Traditional Knowledge. The Dehcho communities have the right to deny any outside party access to any documented Traditional Knowledge that they possess.

As the primary guardian, protectors, and interpreters of Traditional Knowledge, Dehcho First Nation(s) communities will retain primary management of research studies and projects that involve Traditional Knowledge. Co-management arrangements may be made with outside agencies, at the discretion of the community.

Source: *Dehcho First Nations Traditional Knowledge Research Protocol*. 2004. http://www.reviewboard.ca/upload/ref_library/DCFN%20TK%20research%20protocol.pdf

Example 4**IV) Copyright Arrangements**

- A.** Where the material to be published is merely the recorded, transcribed or translated intellectual product of either an individual Maliseet or a group of Maliseets, copyright shall be vested solely in that individual or group of Maliseets, and the recorder, transcriber, or translator shall not be able to claim copyright as Canadian law currently allows.
- B.** Where a researcher adds significant intellectual content and analysis to Maliseet cultural material (as defined under Section I herein):
 - 1.** copyright in the original cultural material must be acknowledged wholly in the Maliseet nation, community, or individuals (or their heirs) who provided the original or cultural material; and
 - 2.** joint copyright in the entire work may also be acknowledged in both the researcher or collector and the Maliseet Nation or Maliseet individuals (or their heirs) from whom the material was obtained.

SECTION AND PURPOSE

Ownership of TK.

How do various TK protocols make clear that IK belongs to the community? What is the purpose of owning IK? What are the legal mechanisms by which IK is owned? (Contracts with external study participants? Intellectual property?) Example 4 also provides sanctions should violations of the protocol occur.

SAMPLE TEXT

3. Either copyright arrangement must be approved in writing by the MRRB [Maliseet Research Review Board] prior to display or publication of the material in any form (written, audio, oral, visual or digital)."

Sanctions

-
1. informing the offending person or agency of this Protocol, and of the sanctions to be applied if it is not respected;
 2. reporting the specific violation to the funding agencies and/or head of the institution, corporation, government, or agency employing the researcher;
 3. reporting the violation to the appropriate professional ethics boards;
 4. prohibiting future research among Maliseet people and within Maliseet Nation communities by the offending agency or individual;
 5. public censure of the agency or individual;
 6. legal action where necessary, if all else fails

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. September 2009. https://www.google.com/url?sa=t&rct=j&q=&es-rc=s&source=web&cd=&ved=2ahUKEwjHivPX9bf4AhVURc0KH2DBcUQFnoECAMQAQ&url=https%3A%2F%2Ffachh.ca%2F-wp-content%2Fuploads%2F2018%2F07%2FProtocol_TK_Maliseet.pdf&usg=AOvVaw27Gumnmew-IXAZv6qmu0F_

SECTION AND PURPOSE

Gaining approval/consent

from the community to document and gather IK. *What kind of information does the community require to authorize approval of an IK study in their community? Who makes this decision? Or what body makes this decision?*

SAMPLE TEXT

Example 1

The Assembly of Nova Scotia Mi'kmaq Chiefs' Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition, stipulates in the Application to Conduct Research:

7. Consent: describe the process by which participants consent to participate in the research project; that is, how will participants be informed of their rights as participants, and by what means they will signify their understanding of those rights and consent to participate. Any research involving children shall require parental informed consent (p. 21).

Source: Assembly of Nova Scotia Mi'kmaq Chiefs. *Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/mek%20protocol%20second%20edition.pdf>

Example 2

A Board of Directors is one form of a governance/approval body. This is the community protocol of the Northwest Territory Métis Nation Traditional Knowledge Policy:

The Board of Directors must approve any proposal to study, research, use or collect NWTMN Archival Records, Métis Heritage Resource, Traditional Knowledge or TK Data.

Before approving a project, the Board of Directors must be satisfied that they have been fully informed as to the scope and purpose for the use of the Traditional Knowledge and that the TK project is in the best interests of the NWTMN.

Source: Northwest Territory Métis Nation Traditional Knowledge Policy. <https://nwtmetisnation.ca/wp-content/uploads/2016/02/TKpolicy.pdf>

**Example 3
Checklist****Box Key H: Obtaining Informed Consent**

1. Provide enough information about the proposed project so that participants are able to form an opinion about potential impacts.
2. Explain why traditional knowledge is being collected.
3. Explain and commit to how and where their traditional knowledge will be used, and where and how original interview materials will be archived.

SECTION AND PURPOSE

Gaining approval/consent from the community to document and gather IK. What kind of information does the community require to authorize approval of an IK study in their community? Who makes this decision? Or what body makes this decision?

SAMPLE TEXT

4. Discuss the purpose and process of the impact assessment that traditional knowledge is being collected for.
5. Note that you understand that they have the right to:
 - Not participate
 - Set conditions of use for their traditional knowledge
 - Protect their intellectual property rights.
 - Assert confidentiality over certain aspects of traditional knowledge.
6. Note the obligations of researchers and proponent (e.g., respect traditional knowledge collection protocols, instructions for confidentiality).
7. Explain how and when payment would be made for their participation
8. Describe the consultation process.
9. Provide information on who can be contacted if they have additional questions or concerns.
10. Explain how they will be given credit for their contribution.
11. Describe the proposed follow up and data verification process.
12. Repeat what has been agreed too to ensure both parties understand correctly.
13. Use a consent form when possible.

Source: *Traditional Knowledge Guide for the Inuvialuit Settlement Region, NWT Vol. 2: Using TK in Impact Assessments. 2008.* https://achh.ca/wp-content/uploads/2018/07/TK_Inuvialuit-TK-Protocol.pdf

Gaining consent from the community and leadership. There are different levels of consent. Include a clause that requires consent from community or organizational leadership.

Example 1

A First Nation Community will fully be informed about the use and interpretation of its knowledge as well as the frameworks and methodologies used prior to the collection and interpretation of knowledge. The community may grant or withhold its consent for its knowledge to be accessed, disseminated, or otherwise used (p. 5).

Source: *Assembly of First Nations.* https://achh.ca/wp-content/uploads/2018/07/Guide_Ethics_AFN.pdf

Example 2**1.1 Application process**

Researchers must begin working with the ATFE [Akwasasne Task Force on the Environment] in the earliest stages of planning in their proposals. Depending on the nature of the proposed project, researchers are advised to allow sufficient time for community members to thoroughly review and understand all

SECTION AND PURPOSE

Gaining consent from the community and leadership.

There are different levels of consent. Include a clause that requires consent from community or organizational leadership.

SAMPLE TEXT

aspects of the study, ask questions, and resolve differences. Even the simplest of proposals will need more than a month for review, since the ATFE meets monthly. Because research is a cooperative venture, it is not wise to wait until the last minute to write a grant application and assume that the community of Akwesasne will automatically cooperate.

Source: Akwesasne Task Force on the Environment. 1996. *Protocol For Review of Environmental and Scientific Research Proposals*. https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/resources/atfe_protocol_0.pdf

**Example 3
Ensure Informed Consent**

The collection and use of traditional knowledge usually requires two levels of informed consent in advance: from local governing bodies as well as from the individuals sharing that information. Informed consent usually requires some form of documented statement or oral agreement, although the nature of these agreements may vary.

Where regional or community TK protocols are not in place to guide consent considerations, the issue of consent must be discussed in advance with the Aboriginal governments or agencies that represent local TK holders.

Source: Government of the Northwest Territories. *Summary of Best Practices for Applying Traditional Knowledge in Government of the NWT Programming and Services*. https://www.enr.gov.nt.ca/sites/enr/files/reports/tk_best_practices_summary.pdf

Gaining consent for access to Individual's knowledge

from individual TK holders, practitioners, Elders, community members. This must be free, prior and informed consent.

Example 1

See page 14 of the *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.3:*

Phase IV Data Collection**Informed Consent of the Land User/Interviewee**

Before NBMIKS data collection takes place, it is necessary to secure informed consent from each Mi'gmaq participant. Before informed consent is requested Mi'gmawe'l Tplu'taqnn will repeat steps 1 through 5 of the Knowledge Holder Engagement process to ensure each participant is fully aware of the proposed project and the NBMIKS process. This can be done in a group Community Cultural Values Mapping (CCVM) or individually prior to the biographical mapping session.

SECTION AND PURPOSE

Gaining consent for access to Individual's knowledge

from individual TK holders, practitioners, Elders, community members. This must be free, prior and informed consent.

SAMPLE TEXT

A written Consent and Release form is explained and completed. A current example form is attached as Schedule C. However, it is a living document that will be updated from time to time.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. 2016. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide>/<https://migmawel.squarespace.com/s/NBMIKSG-v-3-2018-03-20.pdf>

Example 2

Before MIKS data collection takes place, it is necessary for the Consultant/Researcher to secure informed consent from each Mi'gmaq Participant. Ideally the Mi'gmaq Participant will have prior knowledge of the MIKS, in order to develop an overall understanding of the proposed Project and resulting MIKS. The Consultant/Researcher will begin the interview process by confirming that the interviewees are fully versed in the research process (p.13-15).

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. <https://ethicshub.ca/wp-content/uploads/2020/05/56-New-Brunswick-Mi%E2%80%99gmaq-Indigenous-Knowledge-Study-NBMIKS-Process-Guide.pdf>

Example 3**Informed Consent – Education and Agreement**

Before any data collection takes place, the Consultant must first secure the free, informed consent of the Participant. Two key elements to informed consent are education and agreement. The Consultant shall ensure all Participants are provided with detailed project information and MEKS [Mi'kmaq Ecological Knowledge Study] information to allow them to make an informed decision whether or not to participate in the Study.

- Agreement – Consultants must ensure that the Mi'kmaq Participant's decision to participate in the MEKS is voluntary and that he/she clearly understands the use of the MEK.

The Participant must signify that she/he understands that:

- their participation is voluntary;
- he/she can end the interview or withdraw her/his participation at any time;
- she/he does not have to answer any question with which she/he is not comfortable;
- if desired, his/her identity will be kept confidential; and,

SECTION AND PURPOSE

Gaining consent for access to Individual's knowledge

from individual TK holders, practitioners, Elders, community members. This must be free, prior and informed consent.

SAMPLE TEXT

- that the MEK provided will be included in the MEKS, which may become public record.

A written Consent and Release Form explaining and identifying the above Agreement factors must be signed and completed.

Education – Consultants must provide the relevant information to ensure that the Participants demonstrate a clear understanding of:

- the type of Project proposed – its location, and goals (purpose of the development);
- the scope and purpose of the MEKS;
- the use of the MEKS data in the applicable approval process(es); and,
- that the MEKS is not Consultation for the purpose of justifying an infringement of Aboriginal and Treaty Rights.

Source: Assembly of Nova Scotia Mi'kmaq Chiefs. *Mi'kmaq Ecological Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/MEK%20Protocol%20Second%20Edition.pdf>

Benefit to the community.

How shall the proponent demonstrate benefit to the community?

Example 1

Negotiating Research Relationships with Inuit Communities: A Guide for Researchers was written to help researchers “understand the benefits, opportunities and challenges associated with engaging Inuit communities in research” (p. 1).

Researchers should also consider the following questions:

- a. What types of direct and indirect benefits could my project have within a community?
- b. How can I positively engage community members in the research process?

The process of answering the above questions may reveal ways in which research projects can be developed in order to maximize the potential benefits to community members and researchers (p. 6).

Source: Inuit Tapiriit Kanatami and Nunavut Research Institute. 2007. *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers*. https://www.itk.ca/wp-content/uploads/2016/07/Negotiating-Research-Relationships-Researchers-Guide_0.pdf

SECTION AND PURPOSE

SAMPLE TEXT

Benefit to the community.

How shall the proponent demonstrate benefit to the community?

Example 2**Promoted through Advisory Committees:**

The Mi'kmaw Ethics Watch shall increase efforts to educate each community and its individuals to the issues, concerns, benefits, and risks of research involving Mi'kmaq people, heritage, environment, and promote ethical conduct and conformity concerning protocols and guidelines for doing research in and about indigenous peoples with some kind of disciplinary action against those who do not comply.

Source: Mi'kmaw Ethics Watch. <https://www.cbu.ca/indigenous-initiatives/mikmaw-ethics-watch/>

AND/OR

Benefits to be Included in Protocol:

All research partners shall provide each person or partner involved in the research with information regarding the anticipated risks involved in their participation, and any anticipated benefits.

Source: Mi'kmaw Ethics Watch. <https://www.cbu.ca/indigenous-initiatives/mikmaw-ethics-watch/>

Example 3

Benefits (as well as risks) may be presented or stipulated under research agreements or included in Application to Conduct Research (p. 21)

Usefulness and Benefits: describe any benefit(s) for the individual Mi'kmaq person or to the Mi'kmaw Nation as a whole as a result of this study or its published report or findings (p. 22).

Source: Assembly of Nova Scotia Mi'kmaq Chiefs. *Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/mek%20protocol%20second%20edition.pdf>

Sharing and use of TK. How will information be shared with the community after the project is completed?

Example 1**Ownership Control Access Possession (OCAP)****Access**

First Nations people must have access to information and data about themselves and their communities, regardless of where it is currently held. The principle also refers to the right of First Nations communities

SECTION AND PURPOSE

Sharing and use of TK. How will information be shared with the community after the project is completed?

SAMPLE TEXT

and organizations to manage and make decisions regarding access to their collective information. This may be achieved, in practice, through standardized, formal protocols” (p. 5).

Source: First Nations Information Governance Center. *The First Nations Principles of OCAP*. <https://fnigc.ca/what-we-do/ocap-and-information-governance/>

Example 2

All research, study, or inquiry into Mi’kmaw knowledge, culture, and traditions involving any research partners belongs to the community and must be returned to that community.

Source: Mi’kmaw Ethics Watch. <http://www.cbu.ca/mrc/ethics-watch>

**Example 3
Reporting Back to the Community**

As part of the follow-up process, all researchers working with Gwich’in Traditional Knowledge should return to the community to present the findings of their research. Research results should be presented or displayed in the Gwich’in communities in culturally relevant and creative ways. An example of the latter would be poster or audio-visual formats (p. 15).

Source: Gwich’in Tribal Council. 2004. *Traditional Knowledge Policy*. https://gwichin.ca/sites/default/files/gtc_final_tk_policy_2004.pdf

Example 4

GIS software program shall be used to ensure that the presentation of the MEK [Mi’kmaq Ecological Knowledge] data allows an easy comprehension. When identifying areas and resources for Mi’kmaq use and significance (including but not limited to spiritual sites, fishing sites, etc.) careful attention must be paid to the protection and privacy of hunting, fishing and gathering sites and areas, as provided by the Participant. Where a resource site location is considered sacred and/or is seen by the Participant or Mi’kmaq community as a site [that] should be kept private, the data should be presented in general terms and not site specific.

SECTION AND PURPOSE

Sharing and use of TK. How will information be shared with the community after the project is completed?

SAMPLE TEXT

Historical Data

The Consultant shall ensure that the historical information included within the MEKS [Mi'kmaq Ecological Knowledge Study] is specific to the Project area, or the immediate surrounding area, and will lead to a greater understanding of MEK.

Source: *Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/mek%20protocol%20second%20edition.pdf>

Example 5

The Maliseet Nation (Wolastoqwik) traditional knowledge protocol:

4.8 Maliseet communities have the right to control and determine their proprietary interests in the collection, use storage and potential future use of data. These issues should be negotiated as part of the research process.

MNCC's [Maliseet Nation Conservation Council's] role in Phase III activities:

- Respect, recognize and reinforce the value of Elders and custodians of knowledge, who can teach traditional use and knowledge on a continuous basis.
- Find, encourage and recognize community members, including youth, who seek out Elders and become the next generation of 'knowers.'
- Ensuring only relevant and accurate data are collected for precise and limited purposes and disclosure made only for these original purposes.
- Handle copyright issues of publications and other materials, including MRRB [Maliseet Research Review Board] guidelines.
- Assist with interpretation of results and dissemination.
- Warehousing of MTK [Maliseet Traditional Knowledge] data through development of a Maliseet Nation Archives (MNA).
- Negotiate research agreements and memoranda of understanding.
- Ensure that when reporting MTK data, Consultants shall use a GIS software program.

SECTION AND PURPOSE

Sharing and use of TK. How will information be shared with the community after the project is completed?

SAMPLE TEXT

- Ensure that Consultant's reports include MTK baseline data as well as compliance with any Memoranda of Understanding, or other agreements.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

Administration of the protocol. How will the protocol and its provisions be monitored and enforced? What are the responsibilities of this organization? What happens if the study agreement is violated?

Example 1

The Mi'kmaw Ethics Watch shall come from local community representatives authorized to review ethic principles, standards, protocols, practices of research conducted, knowledge, and heritage.

Each community shall decide levels of authority locally, and who shall speak for the community.

Members of the Watch shall work collaboratively to avoid misuse of information supplied by individuals without permission of the community.

The Mi'kmaw Ethics Watch shall operate on the basis of self-determination of each community and consider the risks and benefits of research and the rights of individuals and collectives to be recognized and protected.

The Mi'kmaw Ethics Watch shall consider the credentials and intentions of each research project, its sensitivity to Mi'kmaw culture and heritage, and consider how the research can benefit the community.

The Mi'kmaw Ethics Watch shall consider problems surrounding the purchase or publication of private materials and removal of artifacts. Private papers, photographs, or artistic productions are protected under copyright. One cannot legally cite, reproduce, publish, refer to, or distribute, documents without permission, from the authors, heirs, or institutions that hold copyright.

Any research involving collection of human genes, Mi'kmaw genetic material, or involving the Human Genome Diversity Project shall be rejected or considered only as to its benefits to the Mi'kmaq people.

SECTION AND PURPOSE

Administration of the protocol. How will the protocol and its provisions be monitored and enforced? What are the responsibilities of this organization? What happens if the study agreement is violated?

SAMPLE TEXT

The Mi'kmaw Ethics Watch shall increase efforts to educate each community and its individuals to the issues, concerns, benefits, and risks of research involving Mi'kmaq people, heritage, environment, and promote ethical conduct and conformity concerning protocols and guidelines for doing research in and about indigenous peoples with some kind of disciplinary action against those who do not comply.

The Mi'kmaw Ethics Watch shall consider the context of the research being requested and the issues of power and control that influence research topics, questions, and results.

The Mi'kmaw Ethics Watch shall encourage researchers to consult with and interpret the research from the tribal perspective and to make research and results available to Mi'kmaw people in their own language(s) and/or orthographies.

Source: Mi'kmaw Ethics Watch. *Mi'kmaw Research Principles and Protocols Conducting Research With and/or Among Mi'kmaw People*. <https://www.cbu.ca/indigenous-initiatives/mikmaw-ethics-watch/>

Example 2 Authority and Accountability

1. Gwich'in Tribal Council:

- a. Authorizes the Gwich'in Social and Cultural Institute to implement the policy on behalf of the Gwich'in Tribal Council.
- b. Represents the rights and interests of the Gwich'in beneficiaries on any matters arising that will promote and protect their Gwich'in Traditional Knowledge.
- c. Ensures that the Gwich'in Social and Cultural Institute and other Designated Gwich'in Organizations have the resources required to manage and apply this policy.

2. Gwich'in Social and Cultural Institute will:

- a. Review all research permits and licences issued pursuant to the Scientists Act (R.S.N.W.T. 1988), Wildlife Act, (R.S.N.W.T. 1988), the NWT Act Archaeological Site Regulations (NWT Act, Chapter 1237, 1978), Fisheries Act, (R.S.C. 1985), the Yukon Scientists and Explorers Act, (R.S.Y. 1986) or the Yukon Act Archaeological Sites Regulations (C.R.C. c.112, 1978) for compliance with the policy guidelines prior to providing advice to the authority issuing the permit or licence.
- b. Ensure that research has gone through an ethical review process before research begins.

SECTION AND PURPOSE

Administration of the protocol.

How will the protocol and its provisions be monitored and enforced? What are the responsibilities of this organization? What happens if the study agreement is violated?

SAMPLE TEXT

- c. Reserves the right to enter into research agreements to collaborate with researchers for proposed Gwich'in Traditional Knowledge research or other socio-cultural research in the Gwich'in Settlement Region (see Schedule A). The Gwich'in Social and Cultural Institute shall ensure that a plain language description of the project is provided to the community in which the research is proposed, and that informed consent has been gained before the research proceeds.
 - d. Monitor Gwich'in Traditional Knowledge projects, studies and other initiatives inside and outside the Gwich'in Settlement Region to improve general understanding of the methodology of incorporating Gwich'in Traditional Knowledge into education, environmental assessment, heritage management and land, water and resource management and planning.
 - e. Participate in the on-going exchange of information about Gwich'in Traditional Knowledge research and development and its incorporation into decision-making.
 - f. Identify areas where Gwich'in Traditional Knowledge can be successfully incorporated into the design or delivery of Gwich'in Tribal Council governance and Board decision-making.
 - g. Develop guidelines for researchers seeking to conduct research on Gwich'in Traditional Knowledge in the Gwich'in Settlement Region that reflect the values and traditions of the Gwich'in as expressed through this policy.
 - h. Encourage the use of collaborative research methods in Gwich'in Traditional Knowledge and Scientific research.
 - i. Communicate the objectives of this policy and its guidelines to all Gwich'in organizations, government departments, researchers, and institutions of public government identified within the Gwich'in Comprehensive Land Claim Agreement and the Mackenzie Valley Resource Management Act.
 - j. Provide the Gwich'in Tribal Council with advice on all matters which fall within the scope of this policy.
 - k. Work with Designated Gwich'in Organizations and Renewable Resource Councils to identify Gwich'in individuals who are qualified Gwich'in Traditional Knowledge holders in specific topic areas and interested in working with researchers.
 - l. Educate elders and other beneficiaries about their individual rights with respect to their participation in all research, including Gwich'in Traditional Knowledge research.
 - m. Recover costs related to the provision of information to researchers, wherever possible. The Gwich'in Social and Cultural Institute will provide the most current Rate Schedule upon request.
- 3. Other Designated Gwich'in Organizations will:**
- a. Review research permits and licences that affect Gwich'in beneficiaries in their communities and provide advice to the Gwich'in Social and Cultural Institute.

SECTION AND PURPOSE

Administration of the protocol. How will the protocol and its provisions be monitored and enforced? What are the responsibilities of this organization? What happens if the study agreement is violated?

SAMPLE TEXT

4. Gwich'in Tribal Council will:

- a. Review research permits and licences with regard to Private and Crown lands. The Gwich'in Social and Cultural Institute will provide advice to the Gwich'in Tribal Council concerning these permits and licences.
- b. Apply this policy within any Impact Benefit Agreements negotiated between the government or industry and the Gwich'in Tribal Council."

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Example 3

Where an Agreement has been signed, the Dehcho Resource Management Authority will play a lead role in project implementation. Where an agreement has been violated, the Dehcho First Nation(s) will either assume full authority over any project activities until any outstanding issues have been resolved, or terminate the Agreement without further notice.

Source: Deh Cho First Nation Traditional Knowledge Research Protocol. 2004. https://achh.ca/wp-content/uploads/2018/07/Protocol_De-Cho-FN-TK-research-protocol.pdf

Procedures of gathering, documenting TK. What are appropriate methods, procedures and processes to ensure TK is collected ethically in the community? Who is involved in the processes?

Example 1

There are a set of principles that guide the gathering, use, and distribution of Smbaa K'e yúndíit'õh:

- Yúndíit'õh is derived from a traditional process of intuition, observation, testing, and validation and is of equal value to western scientific processes.
- Yúndíit'õh belongs to the Smbaa K'e Dene as a whole and is therefore a collective responsibility. Decisions concerning what Yúndíit'õh information to share with outside agencies must be made through a community process, with the full and active involvement of the elders.
- Yúndíit'õh is closely linked with, and dependent on, the language in which it is rooted and must therefore be documented and shared to the greatest extent possible in the Smbaa K'e Dene Yatie dialect.
- Primary management of research and other activities involving yúndíit'õh should remain with the Smbaa K'e Dene Band or its designated body, although co-management arrangements may be negotiated as needed to further the interests of the SKDB [Smbaa K'e Dene Band].

SECTION AND PURPOSE

Procedures of gathering, documenting TK. What are appropriate methods, procedures and processes to ensure TK is collected ethically in the community? Who is involved in the processes?

SAMPLE TEXT

- Ownership and copyright of all Smbaa K'e yúndíit'õh remains with the community as a whole, as represented by the Smbaa K'e Dene Band, and may only be gathered and used by outside agencies for specific purposes under a Yúndíit'õh Research Agreement and with the permission of the community.
- Yúndíit'õh is held by both men and women, so women should be involved in Yúndíit'õh research activities to the greatest extent possible.
- Research and other activities that utilize both yúndíit'õh and a western scientific component must include training, so that Smbaa K'e Dene Band members can learn to use and apply western approaches and technology to the gathering and use of land and resource information.
- Yúndíit'õh gathered for the use of outside agencies must be summarized in a plain language report (in English) and on audio tape (in Dene Yatie) and must be reviewed and ratified by the Smbaa K'e Dene Band before being released.
- Copies of all yúndíit'õh information gathered within the Smbaa K'e traditional land use area must be provided to the SKDB for secure filing. Information designated confidential will be treated as such by the SKDB (p. 2).

Source: *Smbaa K'e Dene Band Policy Regarding the Gathering, Use and Distribution of Yúndíit'õh (Traditional Knowledge)*. 2003. <https://nwtresearch.com/sites/default/files/smbaa-k-e-dene-band.pdf>

Example 2

For clarity, informed consent requires that Dehcho communities receive written requests that detail the nature of the request, the reason for the request, and how the information will be used. Informed consent also requires that outside parties adhere to community policies. All requests granted by Dehcho First Nation(s) will be subject to written confidentiality agreements that contain limited use and distribution clauses.

Traditional Knowledge may only be gathered for use by outside agencies for specific purposes only as outlined in signed Agreements including clarity on intellectual property.

Source: *Deh Cho First Nation Traditional Knowledge Research Protocol*. 2004. http://www.reviewboard.ca/upload/ref_library/DCFN%20TK%20research%20protocol.pdf

SECTION AND PURPOSE

Procedures of gathering, documenting TK. What are appropriate methods, procedures and processes to ensure TK is collected ethically in the community? Who is involved in the processes?

SAMPLE TEXT

Example 3 Interview Process

The following key points will be included:

- Interviews shall be conducted in the Interviewee’s language of preference:
 - » The translator will be someone the interviewee recommends or deems appropriate.
- Interviewees shall have the right to be accompanied by a friend, personal advisor or witness(es) of their choice;
- The Research Team shall provide appropriate materials including a Project description, in terms understandable to the interviewee, any relevant maps and appropriate recording devices that have been approved by the NBMIKS [New Brunswick Mi’gmaq Indigenous Knowledge Study] Committee;
- Interviewees will be provided with an honourarium (This is financial compensation for their time, not their knowledge) and will also be offered ceremonial tobacco.
- The Research Team shall be knowledgeable about and respectful of Mi’gmaq cultural norms and values.
- The Research Team shall take into account ‘response burden’ and ‘vicarious trauma’ (see glossary).

Response burden is commonly addressed by limiting the length of an interview and giving adequate time for the interviewee to answer questions. To this end, an interview will last no longer than three hours in one day per interviewee (with an intermission during a natural break in the conversation every hour), based on the willingness of the interviewee to continue. A timer will be set at the beginning of the interview and reset after each break to prevent fatigue in both the interviewee and researchers.

Secondary traumatic stress (Vicarious Trauma) is a concern for researchers who are interviewing residential school survivors, intergenerational survivors and others who have experienced traumatic events in their life. Mental and spiritual health support for interviewees and the Research Team is needed to mitigate the effects of working with victims of trauma in the interview setting. Interviewees may require support as a result of revisiting past trauma through the interview process. Funding needs to be provided to cover the honourarium for a traditional Practitioner to conduct healing/talking circles and ceremonies as required.

Source: *New Brunswick Mi’gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.4. 2019.* <https://migmawel.org/wp-content/uploads/2021/05/NBMIKSGv4.020190304.pdf>

SECTION AND PURPOSE

Procedures of gathering, documenting TK. What are appropriate methods, procedures and processes to ensure TK is collected ethically in the community? Who is involved in the processes?

SAMPLE TEXT

Example 4 Inclusivity

Engage inclusively and diversely, including women, men, Two Spirit, queer, trans and gender diverse youth, Elders, Knowledge Keepers and lived experience leaders.

Have Knowledge Keepers participate in or lead this work, including developing and implementing the methods or tools that will be used to create or collect Indigenous Knowledges and data.

Co-create knowledge products that are:

- Shared back quickly with Knowledge Keepers and their communities, and made available more broadly where appropriate
- Easy to use and share, for example being available online, by email or by mail or put into a format that is most relevant and in relevant languages”

Source: Indigenous Innovation Initiative. 2021. *Indigenous Knowledges and Data Governance Protocol*. Toronto: Indigenous Innovation Initiative. www.indigenouinnovate.org

Example 5

Checklist for Researchers

- Are familiar with the Gwich'in Traditional Knowledge Policy.
- Include copy of consent form and questionnaire you are using.
- Initial presentation to Chief and Council, local RRC [Renewable Resources Council] and DGOs [Designated Gwich'in Organizations].
- A local Gwich'in interpreter/translator and community assistant are hired as required.

Research Materials

- Mail copies of sound and video recordings (digital and audio), electronic transcripts, maps, photographs, field notes, final report (hard copy and CD) to the GSCI [Gwich'in Social and Cultural Institute] head office in Tsiigehtchic.

SECTION AND PURPOSE

Procedures of gathering, documenting

TK. What are appropriate methods, procedures and processes to ensure TK is collected ethically in the community? Who is involved in the processes?

SAMPLE TEXT

Reporting Back

- Present in person your research findings and results to the Chief and Council, local RRC and DGOs at their monthly meetings and at a public meeting as required.
- Forward a hard copy of final reports to each interviewees and the community when available.”

Source: Gwich'in Social and Cultural Institute. *Conducting Traditional Knowledge Research in the Gwich'in Settlement Area: A Guide for Researchers*. https://nwtresearch.com/sites/default/files/gwich-in-social-and-cultural-institute_0.pdf

How can community influence the design and methodology of research

involving their TK? (related to the above). Step-by-step instructions on how to structure the methodology of the study. Also covered in the above section: **“Procedures of gathering, documenting TK.”**

Example 1

The New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) outlines the suggested phase and format of a NBMIKS (see definition below):

‘NBMIKS’ and ‘New Brunswick Mi'gmaq Indigenous Knowledge Study’ mean all components of a study, which includes the planning, collection, analysis, protection, reporting and distribution of Mi'gmaq Knowledge in New Brunswick” (p. 6).

NBMIKS Phases & Format

- Phase I: Study Scoping & Study Description
- Phase II: Desktop Literature Review
- Phase III: Mi'gmaq Community Information Sharing
- Phase IV: Knowledge Holder Engagement & Community Cultural Values
- Mapping
- Phase V: Individual Interviews and Biographical Mapping
- Phase VI: Interim Report to Community
- Phase VII: Follow-up interviews
- Phase VIII: Groundtruthing
- Phase IX: Data Analysis & Community Review of Draft Final Report

SECTION AND PURPOSE

How can community influence the design and methodology of research involving their TK? (related to the above). Step-by-step instructions on how to structure the methodology of the study. Also covered in the above section: **“Procedures of gathering, documenting TK.”**

SAMPLE TEXT

- Phase X: Final Report”

Source: *New Brunswick Mi’gmaq Indigenous Knowledge Study Process Guide*. 2016. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

Example 2

Customary laws and practices

In the context of a documentation project, due consideration is also required for customary laws and practices, which may determine whether and how TK can be obtained and shared, how must it be presented, in what form, by whom, and so on.

As a general rule, research institutions, NGOs [non-governmental organizations], or other third parties undertaking documentation need to ensure that customary laws and practices are fully respected at all stages of the TK documentation project. Whether expressed in written guidelines, codes of conduct, community protocols, formal agreements (written or oral) or even simple instructions given by TK custodians, communities or their representatives, efforts should be made to ensure such requirements are met.

Customary laws and practices need to be considered before documentation takes place, but may also arise during the documentation process. Indeed, when documentation activities begin, this may bring to light conflicts with customary laws and practices not envisaged at the date an agreement for documentation was made (p. 12).

Source: World Intellectual Property Organization. 2017. *Documenting Traditional Knowledge. A Toolkit*. https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf

SECTION AND PURPOSE

Data verification and interpreting data. Procedures for verifying with community, information that was gathered. Community involvement in interpreting the information.

SAMPLE TEXT

Example 1

The Mi'kmaw Ethics Watch shall encourage researchers to consult with and interpret the research from the tribal perspective and to make research and results available to Mi'kmaq people in their own language(s) and/or orthographies" (p. 21).

Source: Mi'kmaw Ethics Watch. <https://www.cbu.ca/wp-content/uploads/2019/08/MEW-Principles-and-Protocols.pdf>

Example 2**Data Analysis/Interpretation**

1. Community informed of results (minimal involvement): The standard requirement of most northern research licensing and funding agencies is that researchers submit translated annual summary reports of study findings to local authorities.
2. Community as advisor: The researcher undertakes preliminary analysis of data and seeks community feedback to ensure that the results make sense from a local perspective. The researcher then revises the analysis and prepares results taking local interpretation into account, but researcher interpretation takes precedence (i.e. community concurrence is not necessarily required).
3. Community as research manager (maximal involvement): The community must accept the validity and accuracy of the researcher's analysis and interpretation before results can be finalized; community explanations for perceived errors must be thoroughly addressed to the satisfaction of both parties" (p. 12).

Source: <https://www.itk.ca/sites/default/files/Negotiating-Research-Relationships-Researchers-Guide.pdf>

Example 3**Disposition of the data**

Describe how individual participants will be informed on how data will be used. Remember that both the community and the participants must clearly understand what the researcher plans to do with the information that is collected. Describe plans to provide individual participants with their own personal results. In addition, describe how the community at large will be educated or empowered by this study. Describe how frequently and in what manner aggregate data and progress reports will be shared with the Research Advisory Committee. Describe communication strategies that will be used to present aggregate data to the community at large. Remember, data must be shared with the community of Akwesasne before it is shared outside the community.

Source: Akwesasne Task Force on the Environment. 1996. *Protocol For Review of Environmental and Scientific Research Proposals*. https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/resources/atfe_protocol_0.pdf

SECTION AND PURPOSE

Data verification and interpreting data. Procedures for verifying with community, information that was gathered. Community involvement in interpreting the information.

SAMPLE TEXT

Example 4 **“Groundtruthing” sessions to verify land-based data**

NBMIKS Groundtruthing

Groundtruthing sessions will include the use of land and waters with interviewee(s) traveling to the study area to confirm land and waters use data collected during the interviews and to further elicit the memories of Knowledge Holders. The Knowledge Holder may request to be accompanied by an assistant of their choice.

Source: *New Brunswick Mi’gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.4.* 2019. <https://migmawel.org/wp-content/uploads/2021/05/NBMIKSGv4.020190304.pdf>

Example 5 **Interpretation of the data and the rights of Knowledge Holders & Indigenous Communities**

3.0 Interpretation

3.3 This MTK [Maliseet Traditional Knowledge] Protocol is intended to complement and support the operation of the Maliseet Research Review Board (MRRB), that pertains to MTK data collection and, in the event of a conflict between this protocol, and any other guidelines or laws, the guidelines in this Protocol, including the Maliseet Ethics Guidelines, shall take precedence.

Source: *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol.* 2009. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

Example 6 **MIKS (Indigenous Knowledge of the New Brunswick Mi’gmaq) Ground Truthing**

The MIKS [Mi’gmaq Indigenous Knowledge Study] will include Ground Truthing sessions, whereby the Consultant/Researcher and a selection of interviewee(s) travel to the potential Project area to confirm oral and written data, and to further elicit the memories of knowledge holders. The knowledge holder may request to be accompanied by an assistant of their choice.

Source: *New Brunswick Mi’gmaq Indigenous Knowledge Study (NBMIKS) Process Guide.* 2016. <https://ethicshub.ca/wp-content/uploads/2020/05/56-New-Brunswick-Mi%E2%80%99gmaq-Indigenous-Knowledge-Study-NBMIKS-Process-Guide.pdf>

SECTION AND PURPOSE

Confidentiality (of people who shared the knowledge or location of the knowledge such as sacred sites, burial sites, species at risk). Is there any reference to confidentiality in the TK protocols?

SAMPLE TEXT

Example 1

Specific confidentiality agreements or more explicit contractual clauses may be required to satisfy the interests of those participating in the documentation process, especially indigenous peoples and local communities. These may include provisions which limit who can access TK, and under what circumstances (i.e., for patent search purposes only, by national intellectual property authorities only, by selected institutions, etc.). In such cases, it is advisable to include a clause specifying that obligations to maintain the secrecy and confidentiality of the database should remain even after the termination of the agreement.

It may be necessary to develop protocols on access and use to maintain undisclosed TK under special and stronger access restrictions or committing to higher levels of secrecy. If the idea is to document undisclosed TK in digital form or using electronic databases, security systems like passwords and codes should be put in place to protect the data related to undisclosed TK (p. 17).

Source: WIPO. World Intellectual Property Organization. 2017. *Documenting Traditional Knowledge – A Toolkit*. https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf

**Example 2
Confidential Data**

The Consultant must give due regard to MEK [Mi'kmaq Ecological Knowledge] data that is of a private or sacred nature, as indicated by a Participant or the Mi'kmaw community and use their discretion to ensure that such data is referenced in a manner that considers the integrity and privacy of the Mi'kmaq.

Source: Assembly of Nova Scotia Mi'kmaq Chiefs. *Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/mek%20protocol%20second%20edition.pdf>

Example 3

This section of the New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Guide V.3 describes how the data gathered will be aggregated and Knowledge Holder's confidentiality protected (see page 17):

MIKS Data Analysis

When reporting NBMIKS data a Geographic Information System (GIS) software or equivalent technology will be utilized and data will be presented in a general coded form that reflects overall knowledge, use and occupancy of the land and waters (a composite map). The identity of individual interviewees will be protected by a corresponding PIN.

SECTION AND PURPOSE

Confidentiality (of people who shared the knowledge or location of the knowledge such as sacred sites, burial sites, species at risk). Is there any reference to confidentiality in the TK protocols?

SAMPLE TEXT

The following factors will be used to determine the significance of NBMIKS data:

the uniqueness and nature of the land or waters resource use/occupation;
And the cultural use or spiritual meaning of the land or resource use/occupation.

Disclosure and Reporting of NBMIKS Data

NBMIKS Report findings shall contain NBMIKS baseline information such as the type of use and species harvested or observed.

NBMIK data shall be represented in the report through a variety of means including the use of GIS.

Confidentiality of a Mi'gmaq Participant's NBMIKS data shall be protected as described elsewhere in this Study Guide.

The NBMIKS Report shall provide recommendations on the avoidance, mitigation or remediation of potential impacts of the Project in a manner that reflects Mi'gmaq cultural perspectives.

Mi'gmawe'l Tplu'taqnn and any partner(s) shall have a reasonable period of time to review and comment on the report and propose amendments and then determine when and how it is to be forwarded to the Proponent and or Crown.

The NBMIKS Report must protect the intellectual property rights that the Mi'gmaq individually and collectively hold to all information provided for each study. An approved statement to that effect is appended to this document as Schedule B.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study Process Guide*. 2019. <https://migmawel.org/wp-content/uploads/2021/05/NBMIKSGv4.020190304.pdf>

Example 4
Site Confidentiality

Archaeological Site Protection Archaeological data can provide significant understanding to Mi'kmaq past relationship to the land. As such, this information may at times be included in a MEKS [Mi'kmaq Ecological

SECTION AND PURPOSE

Confidentiality (of people who shared the knowledge or location of the knowledge such as sacred sites, burial sites, species at risk). Is there any reference to confidentiality in the TK protocols?

SAMPLE TEXT

Knowledge Study]. Archaeological data is important to the Mi'kmaq and the Consultant must take the appropriate steps to ensure that any archaeological site is not represented in a manner that could compromise the site or its artefacts. When archaeological information, location especially, is included in the MEKS, references must be made in general terms. As well, when an archaeological site is referenced on a GIS map, its representation must also be presented as to not reveal the specific location of the site.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study Process Guide*. 2016. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

Compensation.

How will TK holders be compensated for their time? The compensation is not for their knowledge but for their time. The holders of the knowledge and communities retain ownership. This may also be included in research agreements.

**Example 1
Compensation**

All holders of Gwich'in Traditional Knowledge should be compensated, if they wish, for their time working with researchers. Compensation can be in the form of a cash payment, an in-kind contribution, or a fair exchange (gas, food, etc.). Compensation will be determined between the researcher and the holder of Gwich'in Traditional Knowledge. Researchers should inform the Gwich'in Social and Cultural Institute how they plan to compensate Gwich'in Traditional Knowledge holders. The Gwich'in Social and Cultural Institute will provide the most current Rate Schedule upon request (p. 14).

Source: *Gwich'in Tribal Council. 2004. Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Compensation

Lack of recognition or compensation: Inuit participants in research projects have not always received appropriate credit in research publications, reports, etc. and/or have not been compensated fairly for their important contributions (i.e. paid adequately and equitably for their time) (p. 4).

Provide fair and adequate compensation for those providing information for a research project, or hired to help with the research process (p. 5).

SECTION AND PURPOSE

Compensation.

How will TK holders be compensated for their time? The compensation is not for their knowledge but for their time. The holders of the knowledge and communities retain ownership. This may also be included in research agreements.

SAMPLE TEXT

Financial compensation: Establish compensation guidelines/rates for project participants, contributors, assistants, and/or interpreters. The northern research institutes can offer guidance on appropriate compensation rates for research assistants, translators, and informants in each region (p. 9).

Source: Inuit Tapiriit Kanatami and Nunavut Research Institute. *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers*. https://www.itk.ca/wp-content/uploads/2016/07/Negotiating-Research-Relationships-Researchers-Guide_0.pdf

Recognition of

TK holders. How should TK holders be given recognition for their contributions and time?

**Example 1
Authorship**

Give recognition: Give credit to community members who have worked on the project and whose knowledge or information shared may form the basis of the study. This includes citations or potential co-authorship, in an appropriate format for academic journals or other publications (p. 9).

Source: Inuit Tapiriit Kanatami and Nunavut Research Institute. *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers*. https://www.itk.ca/wp-content/uploads/2016/07/Negotiating-Research-Relationships-Researchers-Guide_0.pdf

SECTION AND PURPOSE

Intellectual property rights.

What are they and how will they be protected? (Heavily overlaps with the section “Ownership of TK.”)

SAMPLE TEXT

**Example 1
Intellectual Property Rights**

First Nations’ Intellectual Property Rights will include and address the following themes, which currently limit the Intellectual Property Right laws to protect TK.

- Recognize community ownership and control of TK.
- Clarify ‘ownership’ and ‘control’ i.e. ownership for economic gain and ownership for community sustainability from an Aboriginal perspective.
- Protection of TK and practices.
- Inclusion of traditional laws/ customary laws.
- Authorize use and/or refuse the use of TK or cultural practices.
- Respect ancestors and include future generations as identifiable TK holders.
- Recognize transmission of knowledge by specific cultural mechanisms such as Elders, songs, stories, etc.
- Recognize and uphold First Nations inherent and treaty rights.
- Appropriate compensation to First Nations where TK has been used by corporations and industry.

Source: Chiefs of Ontario. 2010. *Traditional Knowledge Primer*. Print.

Example 2

Participants mentioned that there are intellectual property rights around sharing ATK [Aboriginal Traditional Knowledge]; further, non-Aboriginals need to respect that certain ceremonies are not supposed to be documented (p. 33).

Source: Lavalley, Giselle. *Aboriginal Traditional Knowledge and Source Water Protection: First Nations’ Views on Taking Care of Water*. Toronto: Chiefs of Ontario. 2006. Print.

Example 3

Below is the fifth fundamental principle for use of Traditional Knowledge as per the Arctic Council:

5. Traditional Knowledge is the intellectual property of the indigenous knowledge holders, therefore policies and procedures for accessing data and information gathered from Traditional Knowledge holders should be developed at the appropriate ownership level, recognizing and adhering to each Permanent Participants’ protocols.

Source: Arctic Council Permanent Participants for Use in the Arctic. *Ottawa Traditional Knowledge Principles*. https://static1.squarespace.com/static/58b6de9e414fb54d6c50134e/t/5dd4097576d4226b2a894337/1574177142813/Ottawa_TK_Principles.pdf

SECTION AND PURPOSE

Intellectual property rights.

What are they and how will they be protected? (Heavily overlaps with the section “Ownership of TK.”)

Storage and management of TK. How will TK be stored and managed in the community? How do communities ensure they maintain control over access to TK (even though it may be shared externally)?

SAMPLE TEXT

**Example 4
Consultation and Intellectual Property Rights**

An explicit statement must be included in the MEKS [Mi'kmaq Ecological Knowledge Study] that states that the Study is not intended to be interpreted as 'Consultation' for the purpose of justifying an infringement on the existing Aboriginal and Treaty Rights of the Mi'kmaq of Nova Scotia.

The MEKS must include a provision acknowledging that the MEK contained within the Study is subject to the intellectual property rights of the Mi'kmaq of Nova Scotia, which they individually and collectively hold.

Source: Assembly of Nova Scotia Mi'kmaq Chiefs. *Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/MEK%20Protocol%20Second%20Edition.pdf>

**Example 1
Ownership Control Access Possession (OCAP)****Possession:**

While ownership identifies the relationship between a people and their data in principle, possession or stewardship is more literal. Although not a condition of ownership per se, possession (of data) is a mechanism by which ownership can be asserted and protected. When data owned by one party is in the possession of another, there is a risk of breach or misuse. This is particularly important when trust is lacking between the owner and possessor (p. 5).

Source: First Nations Information Governance Center. *The First Nations Principles of OCAP*. <https://fnigc.ca/what-we-do/ocap-and-information-governance>

Example 2

Copies of all Traditional Knowledge gathered will be kept and stored by the Dehcho First Nation(s). Information designated confidential will be treated as confidential by the community, as represented by the local First Nations(s), or other designated body. Traditional Knowledge in any documented form shall not be appropriated or stored by outside agencies without prior consent (p. 5).

Source: *Deh Cho First Nation Traditional Knowledge Research Protocol*. 2004. http://www.reviewboard.ca/upload/ref_library/DCFN%20TK%20research%20protocol.pdf

SECTION AND PURPOSE

Storage and management of TK. How will TK be stored and managed in the community? How do communities ensure they maintain control over access to TK (even though it may be shared externally)?

SAMPLE TEXT

Example 3 Incorporated into Research Agreement with the Gwich'in Social and Cultural Institute

Detail how data will be accessed in future and any storage agreements (p. 9).

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Example 4 The New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Guide V.3 regarding data storage protocols:

Phase VIII Data Management

Data management for Mi'gmawe'l Tplu'taqnn Mi'gmaq Knowledge guidelines, beyond or in addition to this Study Guide, will be based on the NBMIKS Research principles. A comprehensive set of data management protocols will be developed and implemented, which will include data documentation, harmonization, storage, retrieval, cataloging, and dissemination policies, to be amended by Mi'gmawe'l Tplu'taqnn.

Data sets will include records of archival resources, which will be stored using a bibliographic software package. Additional data will include standard academic bibliographies, classified according to keywords; shape files and resultant maps created in geographic information systems; a keyword searchable database of Knowledge Holders (identified only by PIN); digital video files, catalogued by keyword and timeframe; and oral histories that are culturally appropriate and comply with Mi'gmaq law.

Mi'gmawe'l Tplu'taqnn will serve as custodian of this data until such time as directed otherwise by MSM [Mi'gmaq Sagamaq Mawiomi]. Mi'gmawe'l Tplu'taqnn will store the data in a secure setting and back it up regularly.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study Process Guide (NBMIKS)*. V.4. 2019. <https://migmawel.org/wp-content/uploads/2021/05/NBMIKSGv4.020190304.pdf>

SECTION AND PURPOSE

Storage and management of TK.

How will TK be stored and managed in the community? How do communities ensure they maintain control over access to TK (even though it may be shared externally)?

SAMPLE TEXT

Example 5**4.6 Information Storage (Maliseet Nation Archives)**

MNCC [Maliseet Nation Conservation Council Inc.], in connection with the MRRB [Maliseet Research Review Board], will perform the duties related to storage of MTK [Maliseet Traditional Knowledge] materials (interview documents, tapes and videos) and backup copies, make copies of Global Positioning System (GPS) data and maps and enter into an electronic database, also ensuring all files are properly backed up and stored at an alternative secure location.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

Example 6

The MIKS [Mi'gmaq Indigenous Knowledge Study] Report shall be distributed in a timely manner to the relevant Mi'gmaq political organizations. The MTI [Mi'gmawe'l Tplu'taqnn Inc.] shall have a reasonable period of time to review and comment on the report and propose reasonable amendments before it is forwarded to the Proponent. The MIKS Report must protect the Intellectual Property Rights that the Mi'gmaq individually and collectively hold. An approved statement to that effect is appended to this document as Schedule B. The Consultant/Researcher shall make explicit reference in the MIKS Report that it is not Consultation.

Source: Mi'gmaq Sagamaq Mawiomi. *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. <https://ethicshub.ca/wp-content/uploads/2020/05/56-New-Brunswick-Mi%E2%80%99gmaq-Indigenous-Knowledge-Study-NBMIKS-Process-Guide.pdf>

SECTION AND PURPOSE

Community engagement throughout TK study/project. How will community be kept informed of study/project progress? How will community be engaged? How will the final product be reported back to the community?

SAMPLE TEXT

Example 1

Collaborative research methodologies imply that wherever possible, the research project supports community capacity building, including education, research training and employment opportunities for local residents” (p. 13).

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Example 2**A Continuum of Community Involvement**

Various levels of community involvement, within three identified research stages: project design, data collection, and analysis are presented below, along a continuum from minimal to maximal involvement. Reporting research results can also be considered a research stage; however, communication strategies are addressed in a distinct section because they are ongoing throughout all research stages.

Source: Inuit Tapiriit Kanatami and Nunavut Research Institute. 2007. *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers*. https://www.itk.ca/wp-content/uploads/2016/07/Negotiating-Research-Relationships-Researchers-Guide_0.pdf

Example 3**Stipulated within the Sambaa K'e Dene Band Policy or protocol:**

Yúndíit'õh belongs to the Sambaa K'e Dene as a whole and is therefore a collective responsibility. Decisions concerning what Yúndíit'õh information to share with outside agencies must be made through a community process, with the full and active involvement of the elders (p. 2).

Source: *Sambaa K'e Dene Band Policy Regarding the Gathering, Use and Distribution of Yúndíit'õh (Traditional Knowledge)*. 2003. <https://nwtresearch.com/sites/default/files/sambaa-k-e-dene-band.pdf>

Example 4**The New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.3 states:****Phase III Knowledge Holder Engagement**

When the Desktop Review and initial Project Scoping are completed, it is necessary to engage and inform Mi'gmaq community members about the NBMIKS and to identify Knowledge Holders. An initial community meeting is to be held in Mi'gmaq community by Mi'gmawe'l Tplu'taqnn staff or designate. The representative(s) shall:

SECTION AND PURPOSE

Community engagement throughout TK study/project.

How will community be kept informed of study/project progress? How will community be engaged? How will the final product be reported back to the community?

SAMPLE TEXT

1. Share information about the proposed project for which the NBMIKS has been triggered;
2. Describe all the steps of the NBMIKS and how the results will be used; ensuring the use will be in keeping with the NBMIKS Research principles described above;
3. Explain how the land use data will be gathered (e.g. interview process);
4. Describe how the data will be verified, stored and shared;
5. Collect concerns from community members about the project or the NBMIKS process;
6. Arrange for a second community session when Community Cultural Values Mapping (CCVM) will take place.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide V.4.* 2019. <https://migmawel.org/wp-content/uploads/2021/05/NBMIKSGv4.020190304.pdf>

Promotion of TK.

How will TK be used for other community goals (education for youth, adults; cataloging information for the Nation, etc.).

Example 1**Future Generations:****The Gwich'in Tribal Council will manage Gwich'in Traditional Knowledge issues in the Gwich'in Settlement Region in a manner that:**

1. Allows future generations to benefit and learn from Gwich'in Traditional Knowledge (p. 1-2).

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy.* <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Example 2**Language Retention**

Language retention is central to maintaining traditional knowledge and First Nations cultures. There are many ideas in First Nations languages that cannot be translated into other languages, such as English. Once languages are lost, traditional knowledge and ceremonies may also be lost (p. 16).

Source: Crowshoe, C. 2005. *Sacred Ways of Life: Traditional Knowledge Toolkit.* First Nations Centre. National Aboriginal Health Organization. https://www.ktpathways.ca/system/files/resources/2019-02/Traditional_Knowledge_Toolkit_2005.pdf

SECTION AND PURPOSE

How will TK study/ project findings be shared? How will the community be informed of study findings?

SAMPLE TEXT

Example 1 Ongoing Communication

A communication plan: Work this out in the early stages of the project and consult community or regional organizations on appropriate methods for communication. In most cases communities should hear the results of information that they provided before hearing it in southern media, journals, conferences, etc. Community members want to hear back from researchers directly or local residents involved in the research. However, in some exceptional cases where research may be sensitive or controversial southern researchers may not be the best individuals to communicate the results (p. 9).

Source: Inuit Tapiriit Kanatami and Nunavut Research Institute. *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers*. https://www.itk.ca/wp-content/uploads/2016/07/Negotiating-Research-Relationships-Researchers-Guide_0.pdf

Example 2 Reporting Back to the Community

As part of the follow-up process, all researchers working with Gwich'in Traditional Knowledge should return to the community to present the findings of their research. Research results should be presented or displayed in the Gwich'in communities in culturally relevant and creative ways. An example of the latter would be poster or audio-visual formats (p. 14).

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

Example 3 4.6 Communications

The communication strategy shall address the goals of the study and present them as realistic and achievable, provide reassurance to community members that the knowledge gathered through the study will be protected in the best interests of the community, and that confidentiality will be respected.

A communication strategy should be developed for each project including radio advertising, public notices in local papers, public notice boards, public meetings, leadership meetings, mail-outs of

SECTION AND PURPOSE

How will TK study/project findings be shared? How will the community be informed of study findings?

SAMPLE TEXT

brochures, word of mouth, phone calls, school presentations, announcements at community events, Aboriginal radio slots and other methods acceptable to the community and other interested parties.

The communications strategy may also identify key people and groups within the community, and direct information to them. These people may include community members whose influence is significant and whose support is critical.

Source: Maliseet Nation Conservation Council Traditional Knowledge Working Group. September 2009. *Maliseet Nation (Wolastoqwik) Traditional Knowledge Protocol (MTK Protocol)*. https://achh.ca/wp-content/uploads/2018/07/Protocol_TK_Maliseet.pdf

Formal agreements/data sharing agreements. Are there examples of where it is necessary to have agreements? What are samples of these types of agreement? When would they be used?

Example 1

Data management for the MTI [Mi'gma'we'l Tplu'taqnn Inc.] Mi'gmaq Knowledge guidelines will be based on the OCAP [Ownership, Control, Access and Possession] principles. A comprehensive set of data management protocols will be developed and implemented, which will include data documentation, harmonization, storage, retrieval, cataloging, and dissemination policies, to be periodically reviewed and vetted by the MTI.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMIKS) Process Guide*. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

Example 2**Gwich'in Social and Cultural Institute Research Agreement Framework****Schedule A:**

The terms of all Research Agreements are to be negotiated between the researcher and the Gwich'in Social and Cultural Institute in accordance with the Gwich'in Traditional Knowledge Research Policy and attached Guidelines on a project by project basis.

Source: Gwich'in Tribal Council. 2004. *Traditional Knowledge Policy*. <https://gwichin.ca/legislation-and-policy/traditional-knowledge-policy>

SECTION AND PURPOSE

Conflict resolution.

How will disagreements regarding the administration, management and implementation of TK protocol be resolved?

SAMPLE TEXT

Example 1
Elements of a Research Relationship

Conflict resolution – Jointly decide how to suspend (temporarily or permanently) the research project should the community(ies) involved have concerns part way through the project. Perhaps develop a contingency plan in the case that conflict may arise.

Source: Inuit Tapiriit Kanatami and Nunavut Research Institute. *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers*. https://www.itk.ca/wp-content/uploads/2016/07/Negotiating-Research-Relationships-Researchers-Guide_0.pdf

Cultural protocols.

How are appropriate cultural protocols in gathering information and norms in communication made a requirement? E.g., how are language barriers navigated? How are the differences between western science and IK treated?

Example 1
Culturally Appropriate Methodologies, and Communication and Transmission of Knowledge in Indigenous Languages

11. The co-production of knowledge requires creative and culturally appropriate methodologies and technologies that use both Traditional Knowledge and science applied across all processes of knowledge creation.
12. Communication, transmission and mutual exchange of knowledge using appropriate language conveying common understanding, including strategies to communicate through indigenous languages, is critical to work of Arctic Council.

Source: Arctic Council Permanent Participants for Use in the Arctic. *Ottawa Traditional Knowledge Principles*. https://static1.squarespace.com/static/58b6de9e414fb54d6c50134e/t/5dd4097576d4226b2a894337/1574177142813/Ottawa_TK_Principles.pdf

Example 2

Proponents should also consider requiring Indigenous cultural training for their staff or contractors and organize community-specific training with the Indigenous nation to provide a foundational understanding to set expectations for working together and to support understanding Indigenous Knowledge.

Participants should acknowledge that engaging throughout an EA, including engaging with knowledge holders, is a significant workload for Indigenous nations, and that Indigenous nations may be engaging with multiple proponents at the same time. Every project is different and may draw upon the knowledge

SECTION AND PURPOSE

Cultural protocols.

How are appropriate cultural protocols in gathering information and norms in communication made a requirement? E.g., how are language barriers navigated? How are the differences between western science and IK treated?

SAMPLE TEXT

of different community members. Proponents should engage with Indigenous nations as early as possible to determine what is required to work respectfully with the community and provide as much notice as possible to facilitate more effective incorporation of Indigenous Knowledge into the EA process.

Source: Government of British Columbia. *Guide to Indigenous Knowledge in Environmental Assessments*. https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act/guide_to_indigenous_knowledge_in_eas_v1_-_april_2020.pdf

Amendments –

Living document. How can the TK protocol document be amended over time/updated?

Example 1

This NBMKS (New Brunswick Mi'gmaq Indigenous Knowledge Study) Guide may be amended at any time. Amendments will first need to be approved by the MSM (Mi'gmaq Sagamaq Mawiomi) Elders Advisory Council and MTI [Mi'gmawe'l Tplu'taqnn Inc.] member Chiefs. In the event that an amendment is made to this NBMKS Guide, the said amendment shall be forwarded to and discussed with any Consultant/Researcher engaged in a Project or a MIKS [Mi'gmaq Indigenous Knowledge Study], and other Aboriginal organizations conducting Indigenous Knowledge Studies.

Source: *New Brunswick Mi'gmaq Indigenous Knowledge Study (NBMKS) Process Guide*. 2016. <https://ethicshub.ca/tool/new-brunswick-migmaq-indigenous-knowledge-study-nbmiks-process-guide/>

Example 2

This is to be a living document, designed to continue to cultivate and strengthen an understanding of how the insights of Indigenous peoples and nations throughout the Great Lakes can inform and contribute to the work of the Annex subcommittees to achieve the shared goals of the Agreement. Moreover, as

SECTION AND PURPOSE

Amendments –

Living document.

How can the TK protocol document be amended over time/updated?

SAMPLE TEXT

it evolves, this guidance document may help to inform and guide additional protection and restoration activities and initiatives throughout the Great Lakes.

Source: United States Caucus of the Traditional Ecological Knowledge Task Team Annex 10 Science. *Guidance Document on Traditional Ecological Knowledge Pursuant to the Great Lakes Water Quality Agreement*. https://www.bia.gov/sites/default/files/dup/assets/bia/wstreg/Guidance_Document_on_TEK_Pursuant_to_the_Great_Lakes_Water_Quality_Agreement.pdf

Example 3

This 2nd edition of the MEKSP [Mi'kmaq Ecological Knowledge Study Protocol] builds on the 1st edition and incorporates recommendations for improvement and observations from Mi'kmaq, Consultants, Proponents and Government on how to clarify the MEKS process to ensure that the highest quality and most relevant information is provided to decision makers and the Mi'kmaq of Nova Scotia.

Source: Assembly of Nova Scotia Mi'kmaq Chiefs. *Mi'kmaq Ecological Knowledge Study Protocol, 2nd Edition*. <https://novascotia.ca/abor/aborlearn/docs/mek%20protocol%20second%20edition.pdf>

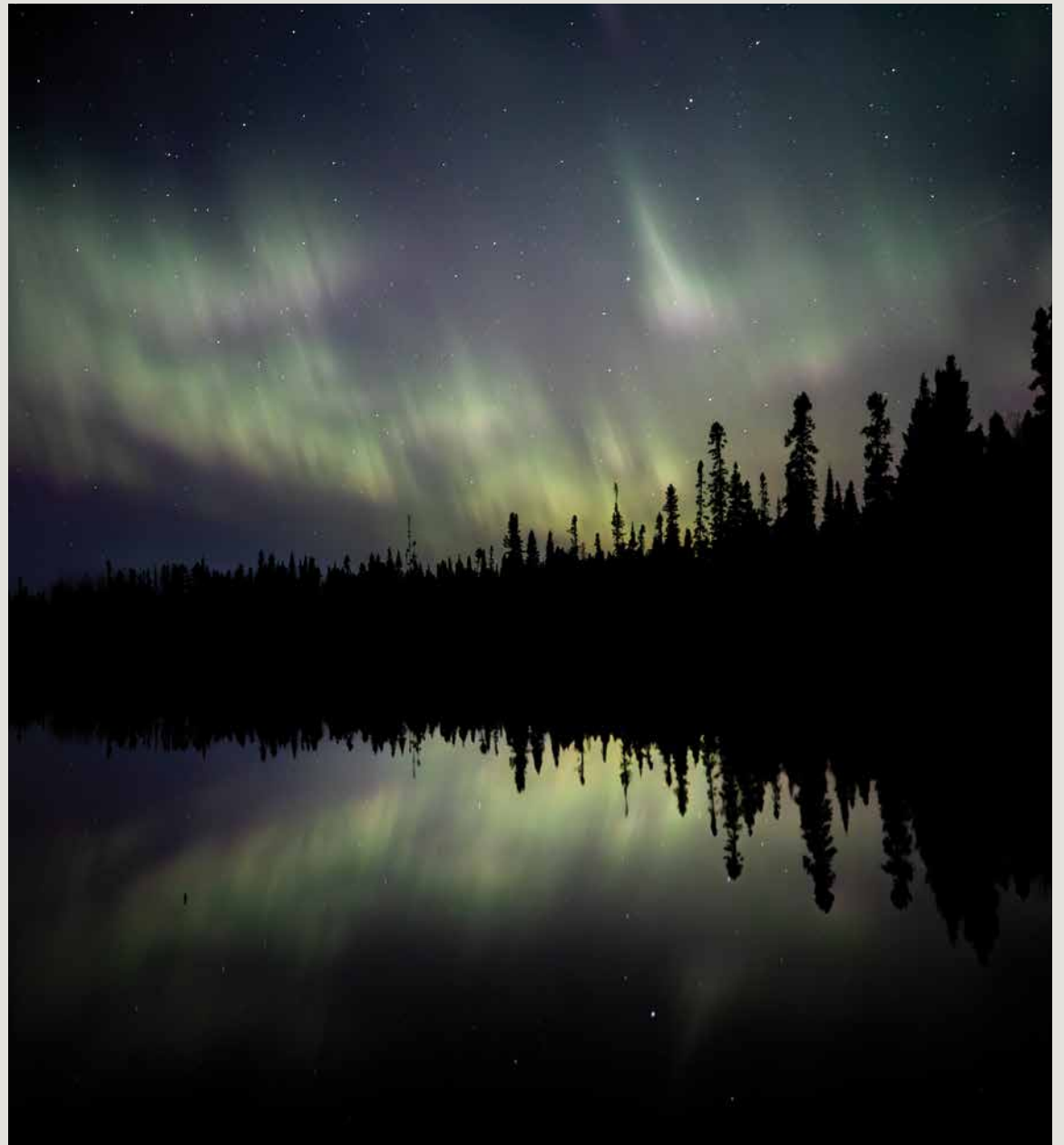
REFERENCES

See the References & Resources Module for a full list of references to this section.

Conducting a First Nations Traditional Knowledge (TK) Study for the Purpose of Environmental Assessment

SUPPLEMENTARY
TOOLS & RESOURCES

02



INTRODUCTION

This module of the Toolkit is intended to guide you through potential approaches to lead your own Traditional Knowledge (TK) study for the purposes of an environmental or impact assessment process. “Indigenous Knowledge” or IK is another term that is broadly used, including by the Impact Assessment Act. It is important that you use the terminology that your community or organization is most comfortable with.

As noted in the Environmental Assessments Module, environmental assessments (EAs) are public processes legislated through federal, provincial or territorial governments in Canada. EAs are intended to support government planning and decision making. It is important to keep in mind, as you work your way through the EA process, that whatever information you share, even if confidential, can still be made public in particular circumstances. There are also growing trends and developments in the broader context that can inform your TK approach in EAs, especially in protecting your knowledge from misuse.

The TK study will generate documents, maps and databases of knowledge that was primarily held and expressed orally and through lived experience. Once documented, they

can become “knowledge” or “data.” You may decide it is important to share your knowledge, but it is equally important to know how to protect or govern how that knowledge will be utilized by others for the benefit of your

Indigenous Data Sovereignty

Indigenous Data Sovereignty is the ability for Indigenous peoples, communities and Nations to participate, steward and control data that is created with or about themselves. The term sovereignty refers to the fact that Indigenous Nations are sovereign in their governance and that extends to their data and Knowledges as well. It recognizes that Indigenous people are the ultimate authority in their data and Knowledges and aims to redefine Indigenous peoples’ relationship to research from being participants or subjects to being meaningful partners and co-researchers.

Source: Indigenous Studies. Updated February 28, 2003. Indigenous Data Sovereignty. University of Toronto Libraries. <https://guides.library.utoronto.ca/indigenous-studies/datasovereignty>

Indigenous Data

Indigenous data is any information that is from or about any Indigenous person or their community, territory or nation, including but not limited to their languages, Knowledges, customs or traditions, intellectual property and ideas (pp. 9-10). (Indigenous innovation initiative, 2021).

Source: Indigenous Studies. Updated February 28, 2003. Indigenous Data Sovereignty. University of Toronto Libraries. <https://guides.library.utoronto.ca/indigenous-studies/datasovereignty>

community. Many First Nation share this concern and have developed protocols to protect knowledge from misuse. Indigenous data sovereignty is an important idea and practice that has emerged in recent years to guide the protection of your knowledge.

First Nations people flourished on their territories for thousands of years based on their own knowledge systems. This means that TK has been informing environmental decision making in First Nations for longer than any other knowledge system (e.g., science). TK has a proven track record of thousands of years

for environmental protection. It important to trust our own knowledge. Embracing and trusting TK does not mean rejecting other knowledge (e.g., science); it simply means putting a high value on TK and protecting it for future generations. As such, it becomes important to ensure the involvement of youth in your TK study and governance.

As noted in the Environmental Assessments Module, conducting TK studies assists with a First Nation's ability to protect inherent rights. Systematically gathering and documenting TK provides you with the knowledge/evidence to demonstrate how a proposed activity (e.g., mining, forestry) will impact your rights and territories. For example, knowledge of fish and wildlife (spawning, migration and habitat) can influence what kinds of activities can or cannot take place on your territories. If fish or wildlife are impacted in negative ways, the decimation of their population will impact a First Nation's treaty right to fish, trap and hunt.

What is a TK Study?

The TK study gathers and documents the knowledge that underlies a way of life. Many people confuse land use and occupancy studies (LUOs) with TK studies. These studies certainly overlap, and both types of studies can inform each other in productive ways. The LUO originated as part of land claim processes, especially in areas of Canada where there were no historic treaties. These types of studies usually map the areas that a certain group of people (e.g., Nisga) “used,” such as hunting, trapping, gathering, fishing, travel routes, etc. The focus of the study is often where geographically these activities took place. “Occupancy” refers to which geographic area a certain group of people managed or governed. LUOs are needed as evidence that different Nations lived in particular areas and engaged in traditional activities, to prove they have Aboriginal

rights and title or treaty rights. An LUO often seeks much of the same information as TK studies and often results in maps and reports. An LUO also uses similar data-gathering methods (e.g., interviews).

TK studies often include the same elements of a LUO study. However, TK studies include the foundational knowledge that underlies why certain areas were best for harvesting and why such geographic locations were selected, as well as knowledge of the wildlife species, geography and ecology of the region. TK studies also include spirituality, philosophy and governance: topics that are often hard, if not impossible, to map. TK includes the relationships that the people have with the natural world (tangible and intangible). For example, the Assembly of Nova Scotia Mi’kmaq

Chiefs, in their 2007 Mi’kmaq Ecological Knowledge Study Protocol, describes their knowledge of MEK as follows:

“MEK” means Mi’kmaq Ecological Knowledge and includes the collection and adaptation of knowledge that Mi’kmaq people have with all components of the natural environment and the interrelationships that exist between all life forms from a unique historical, cultural and spiritual perspective (p. 7).

The document describes a MEK study as follows:

“Mi’kmaq Ecological Knowledge Study” means all components related to the planning, collection, analysis, reporting and distribution of Mi’kmaq Ecological Knowledge in Nova Scotia (p. 7).

TK studies, similar to LUO studies, can be employed as evidence for rights. In the case of EA, both kinds of studies can show how the First Nation’s “rights” may be impacted by proposed development. TK studies are much broader than LUO studies, include deep and vast knowledge about an area, or species, or an activity, including cultural, social, spiritual and relational aspects.

Look at it this way: TK forms the basis of land use and occupancy studies, even if one cannot always document or map a “relationship” to the natural world. It would be impossible to conduct a land use and occupancy study without TK.

TK on Par with Western Knowledge and Science

As there is increasing interest in the knowledge held by Indigenous people

relating to environment/sustainability, it is important to emphasize that TK is equal to and on par with western science.

What is an Indigenous/Traditional Knowledge?

The Assembly of Nova Scotia Mi’kmaq Chiefs, in their 2007 Mi’kmaq Ecological Knowledge Study Protocol, describes their knowledge through the concept of *Netukulimk*.

TK is based on the relationship to the natural world and knowledge generated from those relationships. For example, in the Mi’kmaq cultural tradition, the concept of *Netukulimk* – a concept which includes the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community at large. *Netukulimk* also encompasses ecological beliefs through the interplay of collective and individual responsibilities of the Mi’kmaq to the natural world. Such relationships with the land are holistic in nature and consider many aspects of the natural and spiritual world.

MEK is not static. It is constantly reanalyzed and tested through the experiences of new generations of Mi’kmaq. This experience considers and incorporates new and emerging resource issues, thus enabling reliable MEK data to emerge through a shared experience (p. 6).

Land Use and Occupancy Studies or Mapping

The land use and occupancy mapping or studies “refers to the collection of interview data about traditional use of resources and occupancy of lands by First Nation persons, and the presentation of those data in map form. Think of it as the geography of oral tradition, or as the mapping of cultural and resource geography” (p. xi).

Source: Tobias, T. 2000. *Chief Kerry’s Moose. A Guidebook to Land Use and Occupancy Mapping, Research Design and Data Collection*. Union of BC Chiefs & Ecotrust Canada. https://fngovernance.org/wp-content/uploads/2020/06/Land_Use__Occupancy_Mapping_Guidebook.pdf

Use refers to how people “used” the territories (hunting, trapping, fishing), and the geography where people engaged in these activities. **Occupancy** refers to the area that people regard as their own to govern/manage.

Some EA processes recognize the value of TK as a principle, but it continues to be a challenge in practice. Ensure that you are comfortable that your knowledge will be respected and regarded as credible and on par with western science when utilized in decision making. Build into your TK study a transparency and accountability framework that ensures your knowledge is not marginalized and is respected.

First Nation Led

It is a growing trend that First Nations peoples will lead their own EA processes as described in the Indigenous Laws Module of this Toolkit. This principle also holds true for TK studies, whether you are leading the EA process or not. That is, even if the government, proponents or their consultants are leading the EA process, you should still lead the TK aspect of the EA. “First Nations led and driven” may mean employing a number of strategies that ensure you maintain governance over your own knowledge. If a situation arises where you are unable to conduct the TK study yourself and find yourself in a position of hiring consultants to do the work, you still must lead and direct the study even if others are doing the work. You must retain all decision making over your own knowledge.

Please see examples of First Nations–led EAs in the Indigenous Laws Module.

Conducting a TK Study

There are various ways in which a TK study can proceed in a community. Ideally, the process should be a community-led process with the community leadership in the driver's seat. The following guidelines may be useful to you as you begin this process.

Once a community has become involved in an EA, there should be some degree of familiarity with the project (e.g., mining, forestry, hydroelectric development). The community can then decide if it wishes to share TK in an EA context. It is best that the community have basic and sufficient information on the project to make an informed decision of the potential benefit of TK in the project. If the community does not have this information, then it is important to acquire it. It is important to make informed decisions rather than react to unreasonable

demands and timelines by governments and proponents.

First Nations have different ways of conducting business in their communities and relating to external agencies/interests. Community-based political and cultural protocols must be observed and respected. It is also important to note that First Nations and government agencies have different points of view of the value and effectiveness of EAs and their considerations of TK. As noted earlier, government agencies administering EAs are fulfilling their legislative, regulatory and policy objectives. First Nations believe environmental assessment is part of the fulfilling responsibilities for protecting the environment for future generations. TK is very important to First Nations in environmental decision making and forms an essential part of any

Stewarding and Caretaking of TK

Governing your own knowledge means you have the right and responsibility to determine the way this knowledge/data is collected/gathered, accessed, analyzed, interpreted, disseminated, utilized and managed. TK is intended to improve the well-being of your community and people, and thus it is important to ensure you derive benefit should you choose to share your knowledge. TK should be applied in ways that benefit your community as well as benefit the EA process.

process. While government agencies often regard TK as “additional” information or “nice to get if we can,” First Nations regard TK as absolutely essential for decision making. It is important to understand that not all parties share the same value system, and much learning and negotiation will occur over time to conduct an EA and incorporate TK respectfully.

TK studies can assist you in describing how your First Nation’s citizens and environment will be impacted by any proposed activity. These studies can help you defend your inherent and human rights.

Strategies for Conducting a TK Study

Although a TK study for the purposes of an EA is intended to meet policy, legislative and project review processes, you must also consider how the TK can benefit your community beyond the EA project. TK studies may have co-benefits to your community.

Before you begin your engagement with any proponents, work with your First Nation to come to some consensus around what you wish to define or how you wish to conceptualize your TK. Do not permit external people – including consultants who may work for you – to do this; it is a

Some questions to consider:

1. How will participation in this study benefit your community and peoples?
 2. Will participation in this study protect your rights?
 3. Will participation in this study protect or enhance TK?
 4. How can TK gathered in this study benefit your community and peoples?
 5. Will participation in this study protect the environment for future generations?
-

community decision. Ideally, the concept/definition should be in your language. As noted earlier in this section, the Mi’kmaw employ the concept of *Netukulimk* as the most appropriate term to use to describe the knowledge that informs their relationships with the natural world.

Step-by-Step Process for Conducting a TK Study

Step 1: Make the Decision to Include TK in the EA Process

The decision to conduct a TK study and share this knowledge more broadly (and often on the public record) must have community support. The community leadership should discuss and decide how the inclusion of TK in the EA process will benefit their community. As early as possible in the process, the community

leadership should consult with community members, Elders, TK holders, and practitioners and staff who hold environmental responsibilities as part of their employment. If the community leadership decides that a TK study should be included as part of the EA process, various options should be explored for how this goal can be approached.

If TK is regarded as an important part of the EA process, then the community leadership may inform the proponent or governments that a TK study is required and request funding.

The community leadership may also request assistance/guidance from other First Nations who have faced similar challenges, or from their tribal council (if they have one) or provincial/territorial organization.

Communities need to make decisions on two very important questions:

- a. Whether TK will be included in the EA in the form of a specific stand-alone TK study; and
- b. Whether TK will be part of the formal EA through continuous engagement throughout the EA process in various ways.

First Nation Decision-making Authority

First Nations have a diversity of decision making or governance structures in their communities, from local to regional (tribal council) or treaty level (e.g., Grant Council Treaty # 3). Some First Nations may wish to keep the EA process and TK study separate from the political realm. However, most First Nations may not have the capacity to do so, or separating the EA and TK process from political processes may not be practical or appropriate. Such a decision is up to the First Nation.

A community may well decide both approaches are important. If this is the case, the community can request a study be conducted and engage throughout the project, sharing TK as relevant and appropriate.

As described in the Environmental Assessments Module, proponents (including governments) are seeking TK due to requirements in legislation (e.g., *Impact Assessment Act*, *Fisheries Act*). In fact, the federal government has developed an Indigenous knowledge policy framework, as have some provinces (e.g., British Columbia). External proponents will be requesting your TK; however, you are not under any obligation to share it. You are in the driver's seat: you decide if it is in your Nation's best interest to do so (e.g., protect rights, better environmental decision making). If you decide that sharing (and protecting) your TK is in the best interest of your Nation, future generations and environment, set the terms and conditions for the inclusion of TK in the EA.

Step 2: Determine Study Scoping and Description

It is important that the proponent or government agency provide you with project information and other relevant documents that will assist you in determining the scope of the study and what TK is appropriate for the study. Your First Nation will determine the scale and scope of the TK required to assess the impacts of the project.

Provide your TK protocol and preferred process to the proponent or government agency. Here are some considerations for the scope:

- TK is continuously transforming and thus it is important to ensure that the most recent knowledge is gathered (previous studies are important, but are not up to date).
- The nature of TK required for the study may go beyond the project footprint as determined by the proponent.
- Clearly state the type of TK required for the EA project. The community may feel that some elements of TK that may not be typically considered (e.g., spiritual knowledge) should be included.

Step 3: Establish a TK Committee

The primary responsibility of the TK Committee is to **oversee the TK process** in the community. Once a community has made the decision to include TK in an EA, responsibility must be assigned to make it happen. Responsibility for TK is a collective responsibility and must be shared at the community level. One strategy to achieve broad-based community input into TK work is to assign the primary responsibility to a key group within the First Nation.

The leadership should appoint a TK Committee, comprised of at least one political representative (leadership). Some communities may also wish to assign the TK portfolio to a counsellor so that reporting back to the leadership can occur on a regular basis. Other participants to consider for the TK Committee are well-respected Elders representing expertise, various genders and ages, interested community members and knowledgeable staff. Such a committee should ensure that varying ideas, knowledge and expertise is considered throughout the course of the EA. Such a process recognizes Elders, TK holders and practitioners as decision makers and not simply study subjects.

It is increasingly common to include robust youth representation in such committees. A political representative ensures accountability back to the community. A committee ensures that more than one person stays current and involved in the project. Some TK Committees also appoint resource people with specific expertise relating to the project (biologist, etc.). Ultimately it is up to leadership to determine the composition of the TK Committee.

The TK Committee may then appoint a TK coordinator or project manager to assume responsibility for supporting the Committee.

Roles and responsibilities of the TK Committee may include the following:

- Oversee and manage the TK study and ensure the protection of TK as well as TK holders;
- Determine and request the required resources to engage in your TK process properly;
- Review all relevant project information on an ongoing basis;
- Ensure access to the community and TK holders is approved;
- Provide advice, guidance and support to the TK coordinator;
- Work with the TK coordinator to identify goals and objectives of how to include TK in the EA;
- Facilitate community participation;

- Report back to the community leadership;
- Assist with the management and coordination of the TK study, and retain necessary professional TK researchers if needed;
- Ground truth the knowledge/information/data with the TK holders;
- Determine how best to manage the knowledge/data collected;
- Engage with TK holders in the analysis and interpretation of the TK;
- Determine the best strategy(ies) for including TK in the EA;
- Coordinate training of the government agencies and proponents for cultural sensitivity training; and
- Ensure transparency of the process and accountability of the proponent/government agency/consultant for what happens to TK in the EA process.

The role of the TK coordinator/project manager may include:

- Work with the TK Committee to ensure decision makers have information to make informed decisions;
- Develop terms of reference for the TK Committee (roles, responsibilities, reporting, accountability);
- Ensure EA process timelines are met, or request extensions;
- Report back on activities to the political leadership and broader community;

- Develop a TK study proposal in co-operation with the TK Committee for review and approval by the community and leadership;
- Advise on the progress of the TK study;
- Be the main point of contact for all parties involved in the research;
- Monitor the budget and timeline;
- Ensure the TK study is completed;
- Ensure transparency and accountability in the project;
- Review the TK report and maps with the community to ensure accuracy and that intellectual property is adequately protected; and
- Arrange community meetings with the proponent.

In many instances, a community will decide to pursue a formal TK study. The advantages of conducting a formal TK study are that the process can be transparent and to ensure a degree of accountability back to the community. A formal TK study can also be utilized by the community for other initiatives or community-based projects. The major challenge in conducting a formal TK study is acquiring the necessary funds to conduct a study.

The following sections assume that a community has decided to conduct a formal TK study as the best way to include

It is not appropriate to allow proponents or external consultants unfettered access to community members, youth and TK holders. It is important to ensure that you control access to community members, youth and TK holders. You also have a responsibility to protect TK holders and to ensure they are respectfully compensated for their time.

TK in the EA. These same steps apply even if you decide you require external assistance for the TK study (whether in full or in part). You must develop your own relationships with the proponent or government agency, and not leave that engagement to others.

Step 4: Meet the Proponent and/or Government Agency

It is very important that the community leadership and the community are provided with opportunities to meet with the proponent and/or government agency, and, if requested, any other relevant party. Face-to-face meetings provide opportunities for the community and the proponent

and/or government agency to exchange information and ask questions. At these meetings, the proponent and/or government agency should:

- Provide full disclosure of the purpose and objectives of the study;
- Outline the EA process (length of time, government agencies involved);
- Indicate if other First Nations are involved or engaged;
- Clarify how information provided by the community will be used in the EA;
- Provide details for their process of protecting knowledge or keeping it confidential;
- Clarify if information will be public and who will have access to it (who owns the information); and
- Support and participate in cultural sensitivity training to ensure that external agents appreciate the unique historical, political, legal, social and cultural aspects of your community.

Relationship building is an important part of EA processes and is particularly critical for the conduct of TK studies. It is reasonable to expect that proponents, consultants, government agencies obtain the necessary cultural sensitivity training and knowledge of the colonial history of Indigenous Peoples.

Step 5: Ensure Community Engagement and Knowledge Sharing

A good TK study involves the community at all stages. TK input in an EA will be strongest if the community is informed of and supports the study. Input should be sought on:

- the EA process (and scope of the study), and who wants the TK and for what purpose;
- TK that is relevant to the project;
- who should be involved in the study to ensure adequate representation from women, youth and others;
- what TK to include or not include in the TK study;
- interest to participate on the TK Committee;
- draft reports/maps and other forms of information;
- what TK is appropriate to share externally;
- any conditions on sharing TK externally; and
- expectations for how TK should be respected (on par with western science).

It is important to document any concerns that the community may have about the project and TK work.

Step 6: Engage with TK Holders

It is important to identify TK holders likely to participate in the TK study. Familiarity with the Indigenous languages involved is critical in this work. Ensure that TK holders are able to share knowledge in the language of their choice. It is important to discuss the following with community members and TK holders:

- Describe what knowledge will be sought and collected;
- Gather input on how TK holders wish to engaged;
- Give a timeline for the knowledge collection;
- Determine any preferences of the TK holders;
- Explain what will be asked of the TK holders (e.g., analysis, interpretation, verification of knowledge/data);

- Outline what their involvement will look like over the course of the project (what will be asked of them); and
- Share knowledge back in a form that is accessible and makes sense.

Throughout the project, it is important to keep TK holders informed and engaged, and also to obtain input from the community and TK holders at the beginning of the TK work.

It is also important here to develop a process for how you will resolve disagreements within the TK study itself. Approach this task with humility and respect.

It is important to protect and respect TK holders as well as their knowledge. To ensure TK holders are meaningfully engaged, ensure that you:

- **Obtain consent (on an ongoing basis);**
 - **Share knowledge back in a timely way;**
 - **Ask for verification that you have correctly understood the TK that was shared;**
 - **Involve TK holders in analysis and interpretation;**
 - **Honour requests for changes; and**
 - **Respect their wishes in terms of confidentiality.**
 - **Report back to TK holders for how their knowledge was used in the study.**
-

Step 7: Develop and Design a TK Research Plan

The TK coordinator, in collaboration with the TK Committee and with input from the community leadership and community members, should develop a TK research program. Research that is designed to benefit First Nation communities follows very specific principles and methodologies. First Nation communities and organizations have developed research protocols, guidelines and templates for developing community-based research programs that involve TK, and these can serve as useful guides for designing a TK study. For the purposes of including TK in EA, the TK project coordinator would develop a study proposal for review and approval by the community, including relevant project information, study design, budget, timeline, TK research personnel and capacity building.

a. Relevant Project Information

It is helpful to have large-scale maps that show where the project is located in relation to your community, your traditional use and treaty areas. As well, it is useful to have details on the potential effects of the project (e.g., types of air and water emissions, locations of land disturbance and stream crossings).

Often the proponent will provide project information in its initial contact with community leaders or will have scheduled an open house where members of your community can learn about the project. Sometimes the regulatory agency will provide this information.

If possible, it is helpful to acquire information on similar projects and their environmental impacts, particularly on First Nations. Gathering information on First Nations experiences with similar processes in terms of scale and scope and the nature of the project will be useful in determining the requirements for a TK study.

Furthermore, learning from the experience of other First Nations may be useful in terms of lessons learned or the possibility of utilizing similar approaches and methods for conducting a TK study. It is important to seek information on the project in advance of a meeting with the proponent so you are prepared with relevant questions.

b. Study Design

An initial study design clearly sets out such things as:

- the overall approach to ensure community input and guidance (e.g., communication strategy);

- the objectives of the research in relation to the EA process and the project being reviewed;
- the identification of other benefits the research may contribute to the community;
- the methodology to be used to collect and evaluate the data;
- how analysis, interpretation and verification of the knowledge/data will take place;
- the tasks or steps required to complete the research;
- how the results of the research are to benefit the First Nation in its assessment of the project;
- how it will assist in impact prediction or environmental management of the project; and
- how TK will be shared and protected (how intellectual property will be protected).

Generally, a TK study consists of conducting research to document TK knowledge of particular areas and gather information on the concerns of community members. TK research involves working with people and, therefore, ethics is a primary consideration. TK studies normally include: interviews, focus groups and field visits with Elders, TK holders, TK practitioners and other key individuals; mapping activities with community members; community meetings; site visits; and TK verification activities.

Do Your Homework

Research and find any existing information that already exists relating to your study. Collect existing information on land use and occupancy in the geographic region of importance to your First Nation. Information can be gathered from the following sources:

- archaeological studies, sites and artifacts;
- audio and video recordings;
- land use and occupancy studies;
- place names, burial sites, etc.;
- petroglyphs, photographs, pictographs;
- relevant maps; and
- other studies (previous TK studies, EA studies).

Securing existing knowledge, data and information can provide you with context of land and current/traditional activities in the area your community has determined is important for the TK work.

c. Budget

The budget for a TK study usually in-

cludes the costs of hiring researchers (including community-based researchers) to conduct the study, and possibly hiring an overall project manager. Costs for a TK study may include:

- honoraria for TK holders;
- fees for translators for their participation in the research;
- gifts/Tobacco depending on the cultural protocols of the community;
- travel (for workshops, interviews, focus groups, etc.);
- costs for community meetings (refreshments and meals);
- administrative support and office supplies, including equipment such as cameras, tape recorders, video cameras, etc.;
- potential costs associated with site visits and groundtruthing (e.g., helicopter, boat rental);
- mapping, visual aids and printing;
- possible consulting fees for specialized professional services;
- costs associated with archival research; and
- salary for community-based researchers (e.g., hiring youth to conduct interviews).

d. Timeline

- The timeline for a TK study usually depends on the nature of the project.
- Timelines are driven by the EA process.

- Respect community timelines (decision making).
- Respect the preference and comfort level of TK holders.
- An important consideration is also to understand that the community may have competing priorities and community members may already be heavily committed to other projects.

e. TK Research Personnel

TK research can be an enormous undertaking, and the TK Committee and coordinator must consider whether hiring TK personnel is critical to completion of the study. If a community decides to hire TK personnel to assist with their TK study, there are important criteria to consider.

- Ideally the TK researchers should be from the community. If you have capacity within your community to conduct your own research, this would be the best route to take.
- If at possible, the overall project manager should be from the community, even if he/she is not conducting the research per se.
- If it is not possible to retain TK researchers from the community, then consider hiring researchers from outside the community. Some qualities to consider include:
 - » technical skills (mapping, GPS, GIS, etc.);

- » fluency in both the language of the community and English;
- » working knowledge of cultural protocols and respect for the Elders and TK holders;
- » experience working with people of varying generations and experiences;
- » ideally some experience on the land; and
- » people skills: enjoys working with people, keen, understanding and patient.

TK personnel should understand how to use a geographic information system (GIS), which is a helpful tool for mapping, storing and retrieving TK information. Consider its usefulness when considering the design of the study and when deciding how to store the TK your First Nation is gathering. It is important to check any researchers' qualifications. Request copies of their previous work to assure yourself of their abilities, and check with other First Nations to see what their experience has been with

consultants you are considering using. The terms of reference for the TK researchers may include:

- the scope of work and budget;
- the research process and methodology;
- confidentiality and communication protocol;
- prior and informed consent process from the community and Elders, TK holders, etc.;
- how the information will be used;
- limits to the use of your information;
- the reporting structure for the researchers (project manager and TK Committee, community leadership);
- a clear statement that your First Nation retains proprietary rights to all materials, maps, documents and the final report;
- clearly set-out information on how your community will participate in the analysis, interpretation and review of the TK study;
- how community input will be considered and how revisions will be made.

Special Note

In some cases, a proponent or government agency will hire consultants to conduct their EAs. The proponent or government agency may propose that this consultant also conduct the TK study on your behalf. If possible, negotiate to conduct the TK research yourself to retain control over the process and deliverables (knowledge).

If you are unable to negotiate and acquire funding to conduct the study yourself, you may choose to insist on hiring an independent consultant of your choice. There can be advantages to hiring an independent consultant because they are not also working for the proponent, and may be able to help you strategically. If you must hire expertise from outside your community, ask them for (and check) references (in particular from other First Nations). All external contractors must also take community-based cultural sensitivity training.

In all cases, it is advisable to **appoint a TK Committee to guide the process, direct interactions within the community and ensure the study benefits the community**. Remember, it is not possible to do a rigorous or proper TK study without co-operation from the community and from Elders and TK holders.

If a community decides to hire TK personnel for a TK study, there are many important criteria to consider, such as fluency in ancestral languages and knowledge of community cultural protocols. Ideally, you wish to retain TK personnel from your own community; if this is not possible, ensure that the assistants (consultants, contractors) you require and acquire are *culturally* and *professionally* qualified.

f. Capacity Building

Conducting a TK study offers the opportunity to build capacity within your community. If you decide to hire a consultant from outside the community or if you are working with the proponent's consultant, ensure there is a training component in the work to be completed. For instance, if someone in your community or on staff would like to learn about TK research, this presents an opportunity for them to work with the researcher and become familiar with TK.

Step 8: Present the TK Study Proposal to the Community

When the TK study proposal is completed and personnel are selected, the project coordinator presents the proposal to the community, TK holders and leadership. Community members and leaders review the proposal and make suggestions. If approval to proceed with the study is given, the TK personnel are hired and the study begins. It is important that community members and TK holders are comfortable with the methods proposed for gathering knowledge/data and for how such information will be reported to them. Clearly indicate how you will obtain consent, ensure confidentiality, and analyze, interpret and

verify data with them. Indicate how you will report back to them the results of the input into the EA process – in other words, how their input influenced EA decisions.

Obtain any input or feedback from the community and incorporate such input in your approach. You should consider meeting with TK holders, ideally as a group, to obtain their input into the TK study proposal. Ensure youth and community engagement. These considerations are especially important if you find yourself hiring an external contractor/consultant to conduct the TK study.

Step 9: Conduct the TK Study

A TK study may consist of the following steps:

- a. Develop a communication and engagement strategy for the community to provide transparency of the TK study process, and arrange for venues where community members can express concerns.
- b. Conduct secondary research: archival research, similar impacts on other First Nations, previous TK studies if any, etc.

- c. Work with the TK Committee, leadership and TK personnel to identify key Elders, youth, community members, TK holders and others who have relevant information. You decide who your TK holders and Elders are.

Generally, individuals in the community who have or are likely to have knowledge relevant to the people or area affected by the project will already be known within the community. If not, identify them through a process of consultation with community leaders, Elders and other knowledgeable people. Make sure that each participant is fully informed about the objectives of the study and is willing to participate. Each person who participates must give prior and informed consent to share their knowledge. The consent should be recorded (in writing or orally).

- d. Conduct information-gathering sessions with the community, including TK holders, Elders, leaders, youth, etc.

An information-gathering session is an effective way to start documenting TK for an EA. This usually consists of a presentation and a question-and-answer session about the project, followed by a discussion with the TK holders about their tradi-

tional knowledge and any concerns about the project. You could ask the proponent, its consultants, or the regulatory agency to give your community a presentation about the project. Or, if there is someone in the community familiar with the project and its potential effects, he or she could give the presentation.

- e. Conduct information-sharing sessions with the community, including TK holders, Elders, leaders, youth, etc.

An information-sharing session with TK holders, Elders, etc., is also important. This may consist of focus groups or field visits. Be respectful. If Elders want family members or youth to be present, then please accommodate. Many Elders and TK holders also wish to share their knowledge with family and community members as well.

Comments made by TK holders will often fall into the following categories:

- » concerns about how the project will affect the environment or community at the chosen location;
- » information about the environment at this site, particularly in the past;
- » suggestions for how the project design could be improved to better protect the environment;

- » questions about the project and intentions of the proponent; and
- » past grievances and history of the community.

It is useful to document – with their full and informed consent – any knowledge shared by Elders, TK holders, leaders, youth and community members. If information is shared that is appropriate to map, then do so following appropriate methodology (see the Developing Your Own TK Protocol Module for further information on TK research methods and mapping techniques).

- f. Conduct site visits with TK holders.

Site visits with TK holders, Elders, leaders, youth and interested community members can be a valuable aspect of a TK study, as they allow for the documentation of general knowledge about the area and specific issues related to the proposed locations of project facilities such as plant sites and roads. Helicopter flights are often helpful, especially for large projects.

- g. Ensure TK holders are comfortable sharing knowledge. Offer to have a family member or trusted friend sit with them while engaging with them.

- h. Compile information in a format that is transparent, and ensure accountability (and perhaps ensure confidentiality, depending on the wishes of the TK holder).

When research is complete, it needs to be compiled along with any previously documented information. The information may be assembled into a map, visual aids and a report.

- i. Review the report, visual aids, maps, videos and any other outputs from the TK study.

Once the study is complete, it is important to review it to make sure that you are comfortable with the information and how it is presented. The TK Committee should review the report for accuracy, confidentiality and intellectual property. Community members should also be provided with opportunities to review the report if they wish.

The TK Committee and key reviewers may include the project coordinator, community leaders, TK holders, youth and community members. Once the report is complete and has had an initial review, the results are reported to the community for their review, verification and approval.

j. Maintain TK information.

It is important to have a system to keep track of TK information so it can be used in the future. This may be as simple as keeping copies of the report and maps on file in your First Nation's office.

It is important to ground truth TK information. Individual TK holders may have different experiences or sources for their information. In addition, there may be changes in the environment over time due to natural variation or other factors (such as climate change) that may affect the accuracy of the TK collected.

k. Analyze, ground truth, interpret and verify TK.

Engage in initial analysis and interpretation of the knowledge/data gathered. Prepare a preliminary report to share with the community and TK holders, and present it back to the community. It is important to confirm your interpretation, make corrections if required and verify your findings. This may require more than one meeting.

Ensure the option exists for groundtruthing or making a site visit to the land for TK holders. Groundtruth-

ing may require travel to and from the locations and areas (lands, waters, etc.) that people may speak about. Spending time on the land/waters may elicit more information/memories and in-depth knowledge.

Confirm with TK holders what information/data they would prefer to withhold from the proponent/government agency. Confirm information/data that must be kept confidential if shared. **It is important to reiterate the public nature of EA processes.**

There are already several excellent documents that describe methods for conducting TK research. See the Developing Your Own TK Protocol Module for TK protocols developed by Indigenous Peoples that include data-gathering methods.

Step 10: Present Interim TK Study Findings to the Community, Youth and TK Holders

It is important to continually engage the community, youth and TK holders throughout the processes. Once the initial reports and outputs (maps, etc.) have been prepared, present that information back to the community for further input, to clarify interpretation and to verify the findings.

Present the preliminary findings to the leadership as well. The interim report is confidential and is not to be shared externally until community and leadership approval is granted.

Special Note

Depending on the outcome of the TK preliminary report and input received from leadership, community, youth and TK holders, more research may be required. Every effort should be made to obtain the information that the interim review may have identified as missing.

Step 11: Follow Up with Proponent/Government Agency and Evaluate the Process

Once approval has been granted by the community and leadership to share the report with the proponent and/or government agency, arrange a face-to-face meeting to present the main findings. Ensure time for the proponent/government agency to review the TK study, and for opportunities for further engagement to answer questions or make clarifications.

It is critical here to request transparency and accountability. Request that the proponent and/or government agency report back to the leadership and community, ideally in a community meeting, about how the TK study/work influenced any decision making in the EA process. Request that the proponent and/or government agency explicitly indicate where TK was utilized. If the TK shared was not utilized, the proponent and/or government agency must clearly explain why.

A very important aspect of TK work is to report back to the community on the results of the study and how TK was used in the EA. This process holds the proponent and government agency responsible and accountable to the community. The proponent should be invited back to the community to report on how it utilized TK in the EA and made changes based on TK. This provides the community with further opportunities to provide input into the process and gain more knowledge of the EA process.

Every TK study and EA process is different. There is something to learn from every process, and it is important to gain experience and capacity for future reference, and to share this with other First Nations should the opportunity arise.

Summary: 11 Key Steps to Conducting a TK Study

Step 1: Make the Decision to Include TK in the EA Process

The decision to conduct a TK study and share this knowledge more broadly (and often on the public record) must have leadership and community support and take place as early in the EA process as possible.

Step 2: Determine Study Scoping and Description

It is important that the proponent or government agency provide you with project information and other relevant documents that will assist you in determining the scope of the study and what TK is appropriate for the study. The First Nation will determine the scale and scope of the TK required to assess the impacts of the project.

Step 3: Establish a TK Committee

The primary responsibility of the TK Committee is to oversee the TK process in the community. Once a community has made the decision to include TK in EA, responsibility must be assigned to make it happen. It is important to ensure that a variety of perspectives are represented on the TK Committee (e.g., youth, women). Support staff and resources should be allocated to support the TK Committee.

Step 4: Meet the Proponent and/or Government Agency

It is very important that the community leadership and the community are provided with opportunities to meet with the proponent and government agency, and, if requested by the First Nation, with any other relevant party. This should ideally be done face to face and in the preferred location of the First Nation.

Step 5: Ensure Community Engagement and Knowledge Sharing

A good TK study involves the community at all stages of the project to ensure all relevant perspectives are included in the study.

Step 6: Engage with TK Holders

It is important to identify TK holders likely to participate in the TK study. Familiarity with the Indigenous languages involved is critical in this work. Ensure that TK holders are able to share knowledge in the language of their choice. It is important that TK holders are informed and engaged throughout the project. It is important to obtain input from the community and TK holders at the beginning of the TK work.

Step 7: Develop and Design a TK Research Plan

The TK coordinator, in collaboration with the TK Committee and with input from the community leadership and members, should co-develop the TK research program. Research that is designed to benefit First Nation communities follows very specific principles and methodologies. Pay particular attention to the knowledge-gathering methods that make sense and are respectful of community protocols and practices. Ensure an appropriate budget is secured.

Step 8: Present the TK Study Proposal to the Community

When the TK study proposal and terms of reference are completed, and personnel

are selected, the TK Committee and project coordinator present the proposal to the community, TK holders and leadership for input and further guidance.

Obtain any input or feedback from the community and incorporate that input in your approach. You should consider meeting with TK holders, ideally as a group, to obtain their input into the TK study proposal. Ensure youth and community engagement. These considerations are especially important if you find yourself hiring an external contractor/consultant to conduct the TK study.

Step 9: Conduct the TK Study

A TK study involves a number of activities depending on what the leadership and community want. Key considerations include generating awareness and ensuring transparency of the study through information-gathering sessions with the community, including TK holders, youth, Elders, leaders, youth etc. If Elders want family members or youth to be present in any data-gathering activity, then please accommodate. Many Elders and TK holders also wish to share their knowledge with family and community members as well.

Once the study is complete, it is important to review it to make sure that you are

comfortable with the information and how it is presented. The TK Committee should review the report for accuracy, confidentiality and intellectual property. Community members should also be provided with opportunities to review the report if they wish.

It is critically important to establish a data management and governance system to house TK. Where data will be held and in what form (videos, transcripts etc.), and who will have access, are essential considerations.

Step 10: Present Interim TK Study Findings to the Community, Youth and TK Holders

It is important to continually engage the community, youth and TK holders throughout the process. Once the initial findings and outputs (reports, maps, etc.) have been prepared, present that information back to the community for further input, to clarify interpretation and verify the findings. Present the preliminary findings to the leadership as well. The interim findings are confidential and not to be shared externally until community and leadership approval is granted.

Step 11: Follow Up with Proponent/ Government Agency and Evaluate the Process

Once approval has been granted by the community and leadership to share the report with the proponent and/or government agency, arrange a face-to-face meeting to present the main findings. Ensure time for the proponent/government agency to review the TK study and provide opportunities for further engagement to answer questions or make clarifications.

A very important aspect of TK work is to report back to the community on the results of the study and how TK was used in the EA. This process holds the proponent and government agency responsible and accountable to the community. The proponent should be invited back to the community to report on how it utilized TK in the EA and made changes based on TK. This provides the community with further opportunities to provide input into the process and gain more knowledge of the EA process.

Ways to Include TK in EAs

After preparing a TK study, there are several ways you can incorporate it into the EA process, including:

- submitting TK directly to the EA process;
- contributing to the development of mitigation plans;
- participating in the proponent's baseline studies;
- presenting TK orally to a panel or at a hearing;
- contributing to the design of monitoring and follow-up programs;
- contributing to the development of impact benefit and other agreements; and
- as input into strategic or cumulative assessments.

Your community may decide to use TK in some or all of these activities. How you decide to include TK could depend on a number of factors, including the types of issues and concerns that your commu-

nity has about the project, the size and complexity of the proposed project, your relationship with the proponent, and the funding and time available.

Submitting TK Directly to the EA Process

TK information can be provided in your written submissions or as a stand-alone report to the Environmental Assessment Office or the Responsible Authority (in federal assessments) and/or to the proponent.

Submitting TK as a stand-alone report has the following benefits:

- It allows your First Nation to have complete control of the information that is submitted and that may ultimately become public.
- It presents TK in a comprehensive and systematic way, and can bring a lot of information together in a single document.

- It is easily distributed beyond the EA process itself, and so can become a useful public education tool.
- It provides a permanent record of how TK was used in a given EA process.
- It can be used in the community for other purposes.
- It can be submitted at any stage of an EA.
- Submitting TK as a stand-alone report has the following pitfalls:
 - It may difficult to incorporate into the EA process.
 - It simply may not get used: sometimes supporting a TK study is thought to be sufficient.
 - If the TK study is conducted later in the EA process rather than earlier, input is not considered in a timely manner.
 - It is more challenging to ensure transparency and accountability.

Using TK in the Development of Mitigation Plans

Your documented TK can help identify important mitigation measures that your First Nation needs to ensure are in place, either in your direct negotiation with the proponent or in written submissions to the regulatory agency.

It is important to ensure that you engage a wide cross-section of community members to manage bias or preferences of one group over another. All values and ideas should be considered equally in order to mitigate environmental effects appropriately.

Participating in the Proponent's Baseline Studies

Out of respect for the TK holders and the knowledge they shared, there should be a section for the recommendations which arise as a result of the provision of TK in the baseline studies.

Typically, proponents hire environmental consultants to collect baseline information and write the EA. The consultants usually conduct field programs including activities such as collecting water samples, mapping vegetation communities, surveying wildlife and fish, and conducting archaeological studies.

Presenting TK to a Review Panel

Some federal EAs are subject to a full public review by a review panel. If there is a review panel or public hearing in an EA process, this is an opportunity for TK holders to directly influence how TK is considered.

Panels are set up so that information presented by the proponent can be directly examined through a public process. Panel members hear submissions from a wide range of presenters, including the general public, First Nations, western scientists and regulatory agencies. The panel then makes a set of recommendations, in the form of a panel report, to the Minister of the Environment with respect to the project.

Direct involvement of TK holders in a panel hearing can increase the effectiveness with which the panel receives and understands the information. It will likely also increase the TK holders' sense of engagement in influencing events and decisions on behalf of their community. To be most effective in a panel review, select a project coordinator to coordinate your community's input into the review process.

As with evidence prepared for a court case, in this situation TK is the evidence to support the point or position your First Nation is making in the assessment. In planning the presentation, inform yourself about the scope and content of the available community knowledge that will be relevant to the assessment.

Using TK in the Design of Follow-up Programs

TK will be helpful in the design of monitoring programs, as well as for testing impact predictions. In your TK research, it will be useful to identify what things in the environment would need to be monitored from your community's perspective if the project were developed. TK can identify the indicators (e.g., change in land use intensity and harvest success rates) that can be used in effective monitoring if the project proceeds.

Recall that EA is a public process; be sure that the information you are about to present is appropriate and approved by your community for public disclosure.

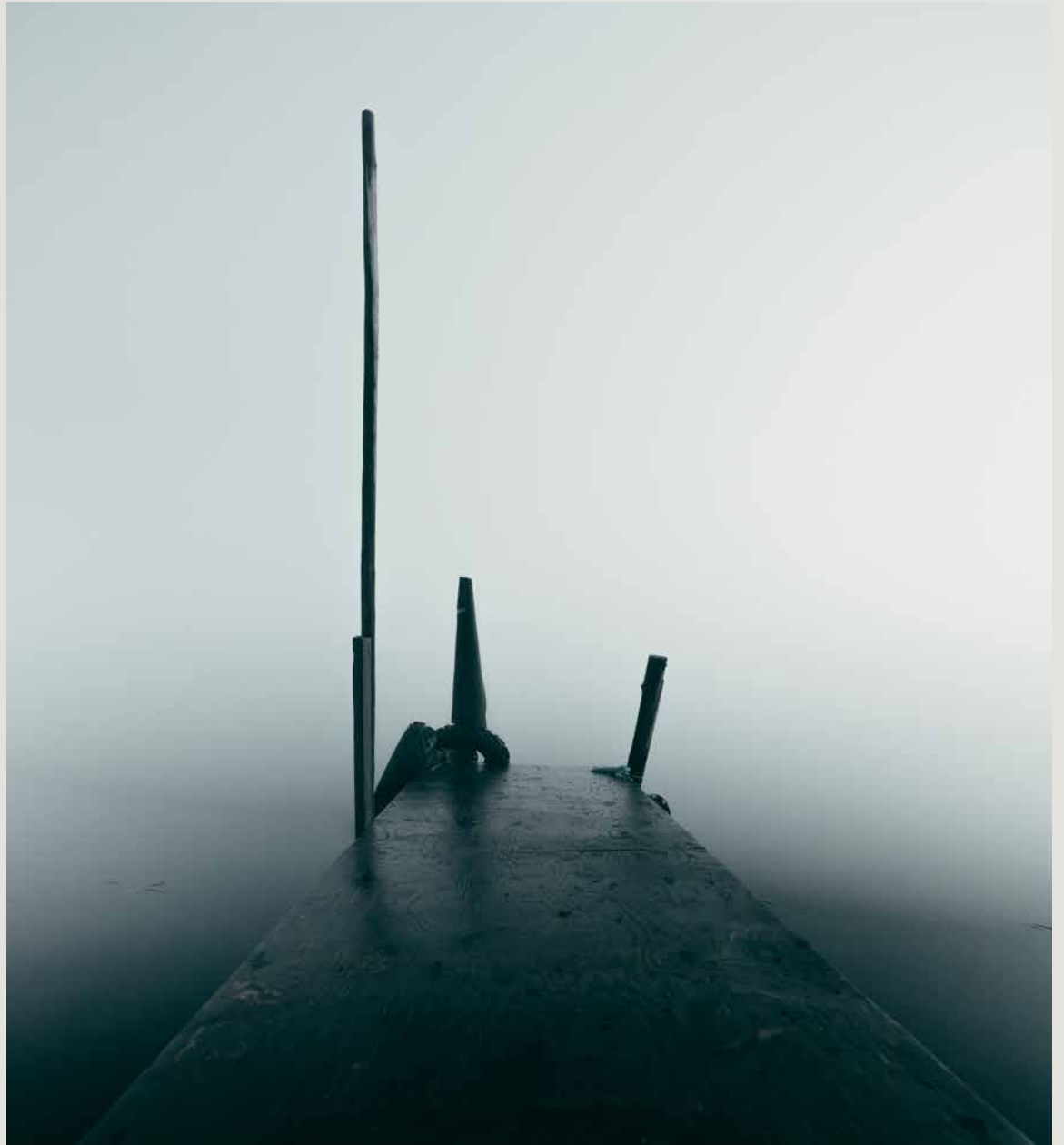
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See the References & Resources Module for a full list of references to this section.

References & Resources

SUPPLEMENTARY
TOOLS & RESOURCES

03



NOTE

All URLs listed below were active at the time of writing this publication. If any URL listed below is no longer active, search the document's name online, or contact the organization directly.

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Helpful Resources

Ethics Hub (University of Ottawa): <https://ethicshub.ca/about/>

The Ethics Hub website is an open-access resource for building respectful and equitable relationships between researchers and Indigenous and local communities. The main objective of the Ethics Hub is to bring together and share a set of resources that can contribute to the establishment of more respectful and equitable relationships between researchers and Indigenous and local communities. The Ethics Hub contains:

- A list of instruments developed in Canada and elsewhere to guide research involving Indigenous Peoples (codes of ethics, collaboration agreements, etc.);
- A presentation of the ethical issues of research involving Indigenous Peoples;
- A list of best ethical practices identified from these instruments;
- Tools for evaluating relations between researchers and Indigenous Peoples;
- Methods for the creation of tools for framing research involving Indigenous Peoples; and
- Model instruments for guiding research involving Indigenous Peoples.

The resources and tools on this website are helpful for developing your own TK protocol, data-sharing agreements, confidentiality agreements, etc.

Resources available on this site include:

- Template for developing your own TK protocol (<https://ethicshub.ca/tools/ethics-tools/>)
- Template to negotiate your own confidentiality agreements (<https://ethicshub.ca/wp-content/uploads/2020/05/47-ENGTemplate-for-the-declaration-of-confidentiality.pdf>)
- Template for data-sharing protocol (<https://ethicshub.ca/wp-content/uploads/2020/05/45-Template-for-a-Data-Sharing-Protocol.pdf>)
- Template for developing a TK policy (https://ethicshub.ca/tools/ethics-tools/?_sf_s=Traditional%20Knowledge)

First Nations Information Governance Centre: <https://fnigc.ca/>

This Centre provides training and information on the OCAP principles (Ownership, Control, Access and Protection).

The Indigenous Guardians Toolkit: <https://www.indigenousguardianstoolkit.ca/>

This toolkit contains a helpful chapter on research, and includes resources and links to Indigenous research agreements and TK protocols across Canada.



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