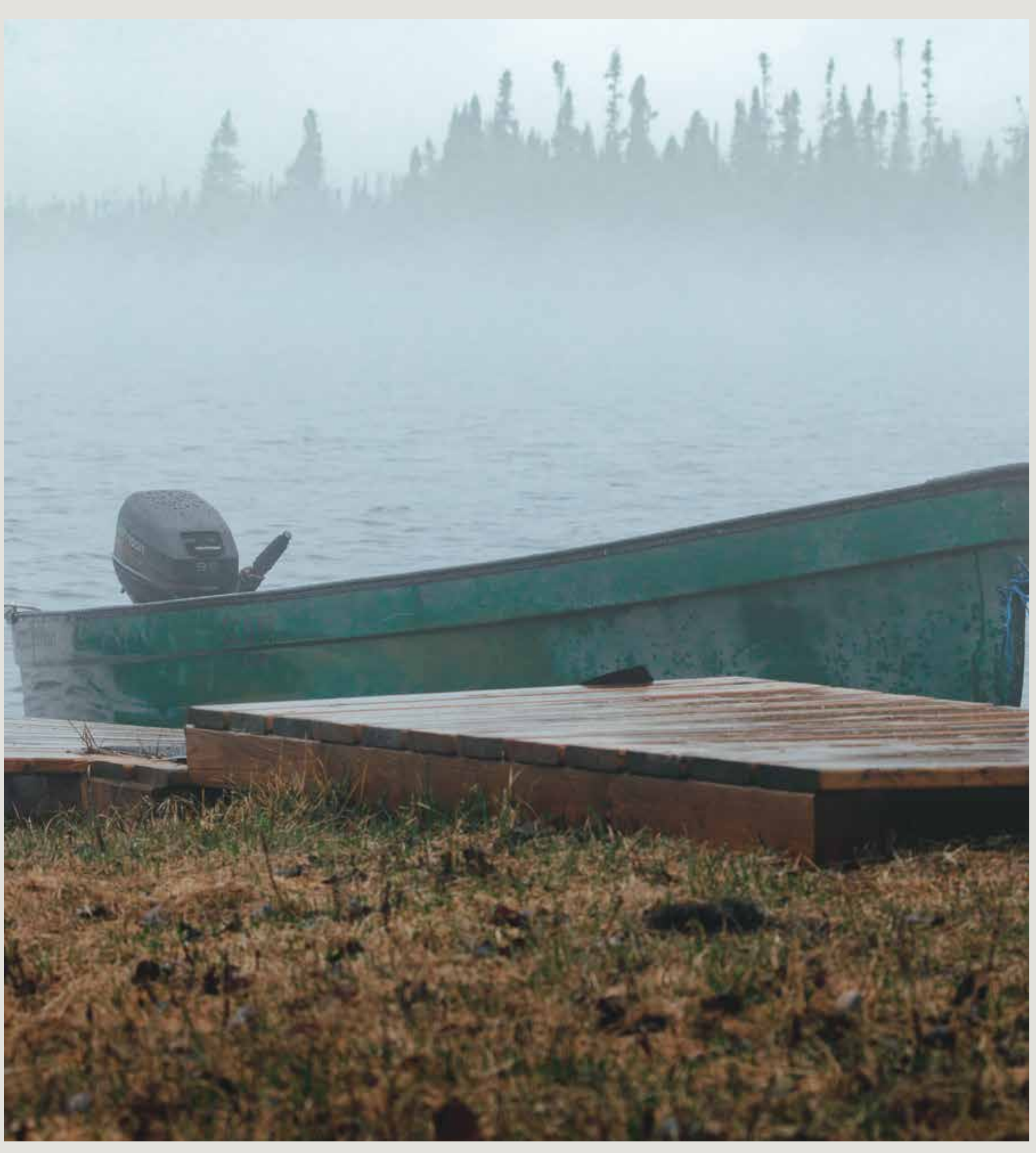
Canadian Legal System Module

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)

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 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 Nations, 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

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.

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 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*.

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.

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

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 STUDY

CREE NATION OF JAMES BAY MINING POLICY[14]

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 NATION[16]

There was a proposed Liquefied Natural Gas project in Sḵwx̱wú7mesh 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 REPOSITORY[17]

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, regardless 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 (MNRF), 2016 ONSC 6899 at para 86; Tsleil-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. a Crown approval of a project or granting of a permit, licence or authorization for a project; or

b. 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.

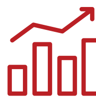
Consultation Checklist

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

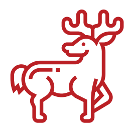
Notify the Crown that you have rights in the area of the project that may be impacted.

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 or hiring your own advisors.

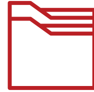


Conduct any studies needed to properly assess the impact of the project on your rights.



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.

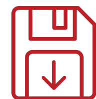
Participating in the Consultation Process While Building a Case to Challenge

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.

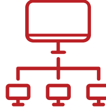
Consider **following up** a phone call or meeting wtih a **written letter** confirming what was discussed and next steps.

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 MINING[60]

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 (MNRF), 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]

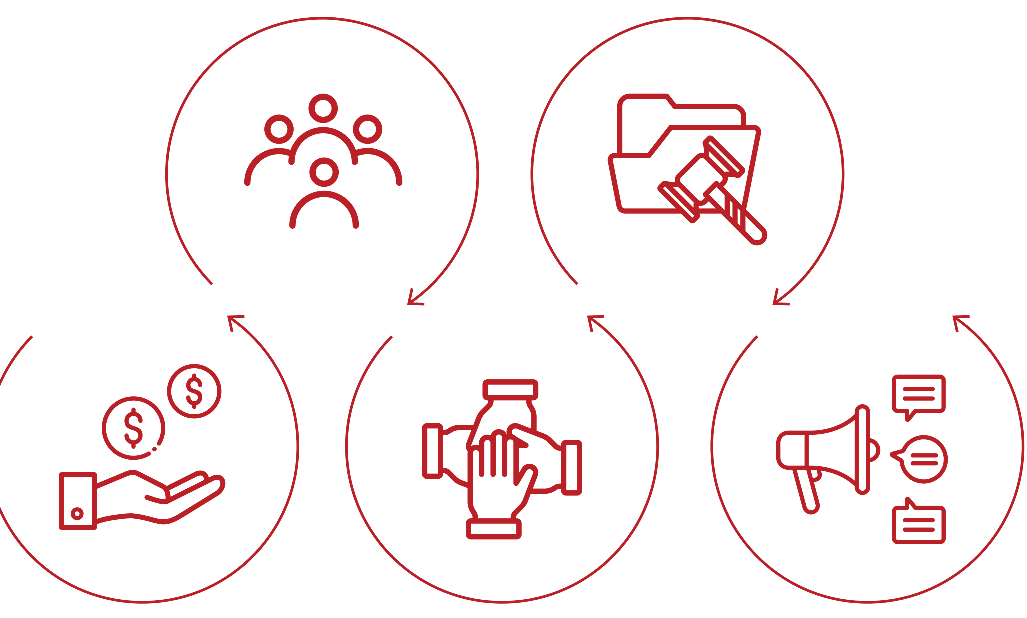
Some Indigenous governments also have jurisdiction over EAs for projects in their territory through treaties or agreements with the federal and provincial/territorial governments. For example, in the Northwest Territories, the Inuvialuit, Sahtu Dene First Nations, Gwich'in and Tłı̨chǫ all have final 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, Sḵwx̱wú7mesh 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



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

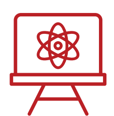
Funding to participate in the process and do studies

Add enforceable conditions to make sure monitoring happens

If done well, can lead to consent

Challenges

Tight timelines

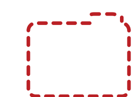


Western science focused

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 Tsleil-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 gathering, 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;

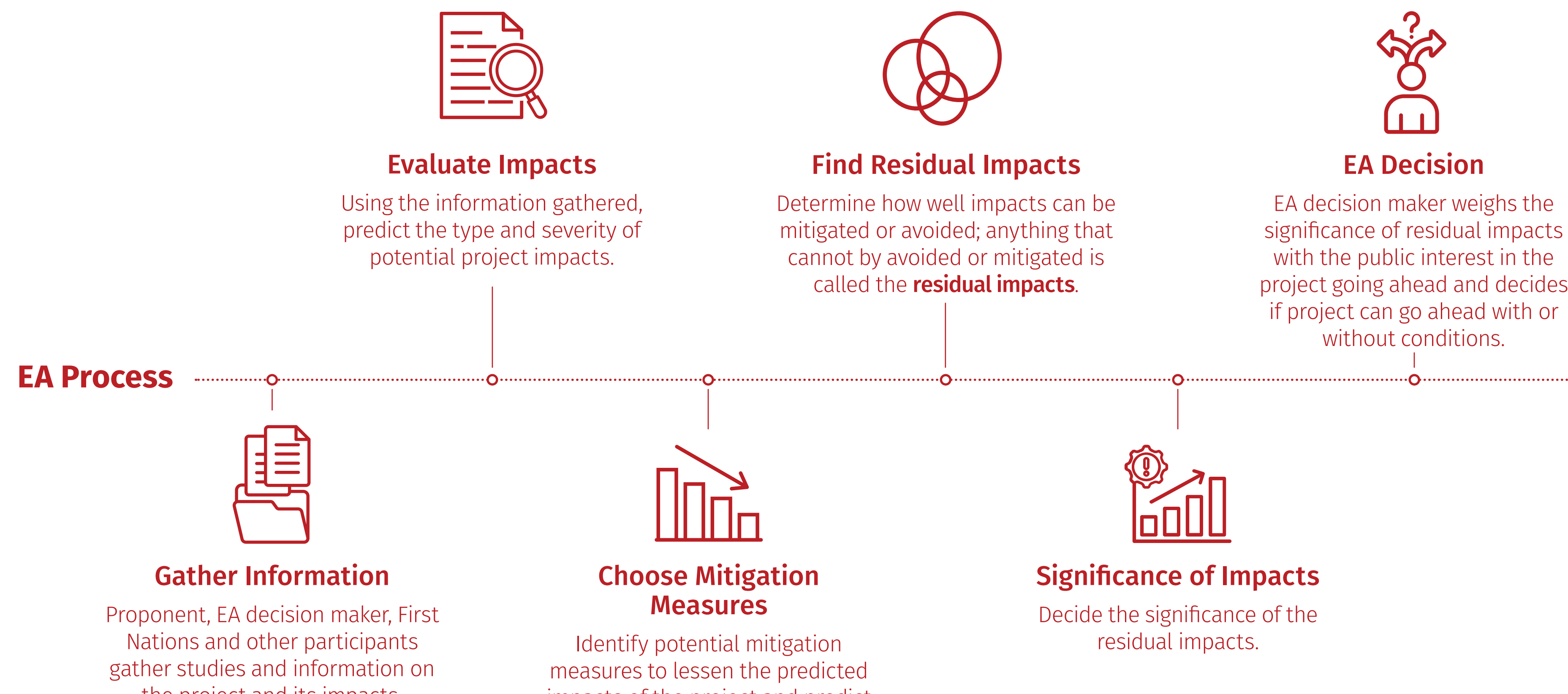
69 Canadian Environmental Assessment Agency. 2019. *Hammond Reef Project comprehensive study report*, at pp 8, 113, 140. https://iaac-aeic.gc.ca/050/documents/p63174/123876E.pdf

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.

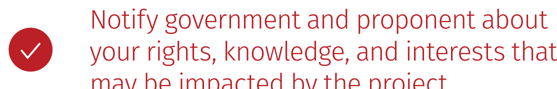
Challenges at this Step

- 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 provincial 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.

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.*