Indigenous Land Stewardship

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## by the

**Alberta Civil Liberties Research Centre**

Mailing Address:

2350 Murray Fraser Hall

University of Calgary

Faculty of Law

2500 University Drive NW

Calgary, AB T2N 1N4

Phone:(403) 220-2505

Fax: (403) 284-0945

Alberta Civil Liberties Research Centre’s home page is located at: [www.aclrc.com](http://www.aclrc.com/)

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Doreen Barrie, Chair; Micheal Wylie, Treasurer, Janet Keeping, Michael Greene, Patricia Paradis and Ola Malik.

**Principal Researchers and Writers:**

Evelyn Tang, B.A., J.D., Student-at-Law.

Sarah Burton, J.D, LL.M., Contractor.

**Legal Editor**

Linda McKay-Panos, B.Ed, J.D., LL,M, Executive Director.

**Project Management**

Sharnjeet Kaur, B.Ed, Administrator.

Linda McKay-Panos, B.Ed, J.D., LL.M, Executive Director.

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# Executive Summary

Canada is at a critical juncture in its relationship with Indigenous peoples. Our leaders, judges, and citizens are demanding reconciliation of the Crown’s fractured relationship with Indigenous communities. Yet interested parties have struggled to make meaningful headway, and often end up arguing in Court rather than working together. Resource development is on the front lines of this conflict, and environmental stewardship is a recurring battlefield. Alberta’s environmental wellbeing lies in the balance.

This study explores how to more effectively integrate Indigenous conceptions of land stewardship into development to enhance environmental protection. This necessitates a detailed consideration of the legal duty to consult, environmental assessment processes, and how these systems interact and evolve.  In fulfilling this task, this report seeks to build on reform efforts currently underway, and to engage with the dialogue already generated on this issue.

After explaining what land stewardship means to Indigenous communities, the report considers the national and international legal structures that support its advancement. In particular, Indigenous communities have harnessed the Crown’s constitutional duty to consult and accommodate their interests in order to advance their land stewardship obligations. This duty is evolving in Canada, and will continue to do so under the guidance of the newly adopted *United Nations Declaration on the Rights of Indigenous Persons.*

While this approach has had its successes, the duty to consult has limitations that have blunted its impact.  On top of internal restrictions, the duty is often intertwined with a broader consultation regime known as environmental assessment. This adds another layer of complexity to an already complicated regime. The result is a web of policies and directives designed to serve all stakeholders through one process. In practice, this structure is functional but clearly flawed. The interaction of these dual regimes has created barriers to the meaningful incorporation of Indigenous concerns into resource development.

There are, however, several ways to work within the present regime to better integrate Indigenous values into the development processes. After reviewing the current processes, this Report makes several recommendations to better integrate Indigenous conceptions of land stewardship into resource development. This includes:

* Earlier and wider engagement with Indigenous communities;
* Increasing stakeholder capacity;
* Adopting a more holistic approach to environmental assessment;
* Ensuring science is uninfluenced by external factors;
* Incorporating Indigenous knowledge and institutions within environmental assessment;
* Embracing the terms set out in the *UNDRIP*;
* Increasing co-management in planning and oversight as accommodation; and
* Re-examining the role of private agreements.

This report argues that better integration of Indigenous land stewardship within resource development is a win-win for everyone.  By removing barriers to participation, government and industry increase certainty while saving time and money by pursuing projects rather than litigating them. By more effectively incorporating Indigenous perspectives into environmental assessments, we not only enhance our environmental protections, we help redefine the relationship Canada has with Indigenous peoples and move towards reconciliation.

#

# Introduction

This report explores how Indigenous conceptions of land stewardship can be better harnessed to enhance environmental protections in Alberta. It proceeds in five parts. After providing a brief note on terminology, Part A outlines what is meant by land stewardship in many modern Indigenous communities. Part B considers national and international legal structures by which Indigenous land stewardship interests are advanced. Here, the Crown’s constitutional duty to consult with Indigenous communities is explored, as is the *United Nations Declaration on the Rights of Indigenous Persons*. In Part C, the report outlines various environmental assessment processes and how governments utilize them as the vehicle by which the duty to consult is satisfied. Part D considers how the duty to consult and environmental assessments interact in practice, with special focus on the restrictions that hinder the integration of Indigenous knowledge and perspectives. After considering the existing framework, Part E makes recommendations as to how traditional Indigenous approaches to land may be more effectively used to advance environmental interests in Alberta.

This issue is important and topical. The federal government has recently affirmed its unqualified acceptance to the provisions of the *United Nations Declaration on Indigenous Persons,* and is currently in the process of re-evaluating its approach to environmental assessments. This is a perfect opportunity to reflect on current processes and reimagine Alberta and Canada’s relationship with Indigenous persons. Over the years, many injustices have occurred in relation to Indigenous peoples, and it is crucial that reconciliation and rectification are continually being pursued. By treating Indigenous communities as partners in land stewardship, governments move towards the goal of reconciliation, while enhancing environmental protections for all Albertans. A refreshed approach benefits all stakeholders. A new perspective can set the stage for cooperative approaches from industry, Indigenous persons, and government, which will permit development to move forward more effectively.

ACLRC would like to thank the United Nations Association of Canada and Canada Green Corps for their contribution to this project.

# Terminology

Language is important when discussing the rights, traditions and practices of the varied and diverse people living in Canada today. Terminology evolves and norms change.

Laws do not always keep pace with this evolution. In 1982, the Constitution of Canada recognized and affirmed the rights of First Nations (referred to as Indians in that document), Métis, and Inuit persons using the umbrella term “Aboriginal” which includes all three distinct groups ([Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) (the “*Constitution*”)). For several years, Canadian courts and government agencies used the word Aboriginal when referring to the First Nations, Métis, and Inuit persons in Canada.

More recently, and for various reasons, there has been a grassroots movement towards the internationally established term Indigenous (see [Bob Joseph, “Indigenous or Aboriginal, Which is Correct?” (5 January 2015)](https://www.ictinc.ca/blog/indigenous-or-aboriginal-which-is-correct); [Marks, Don, “What's in a name: Indian, Native, Aboriginal or Indigenous?” CBC News (2 October 2014)](https://www.cbc.ca/news/canada/manitoba/what-s-in-a-name-indian-native-aboriginal-or-indigenous-1.2784518) [Marks]). In 2015, the federal government changed its governmental department name from Aboriginal Affairs and Northern Development Canada (AANDC) to Indigenous and Northern Affairs Canada (INAC), and is now in the process of transitioning to Indigenous Services Canada.

There has also been a movement to more proactively understand and acknowledge the distinct and separate identities of the First Nations, Métis, and Inuit peoples within Canada, instead of using umbrella terms to treat them as one homogeneous group.

This report seeks to provide a platform for education and discussion using respectful terminology. Given the growing consensus across Canada, this report has opted to use the term “Indigenous” when referring to the collective name for the original peoples of North America and their descendants. Where possible, this Report will use the specific name for the Indigenous groups or communities being discussed (First Nations, Métis, and Inuit). However, this report discusses the *Constitution*, legislation, judicial decisions, and academic pieces from differing time frames. The term Aboriginal is prevalent throughout these documents. Other terminology, and particularly the word Aboriginal, appears throughout this report.

As always, the authors welcome feedback, particularly in relation to the language used.

# Stewards of Land

While there is no monolithic Indigenous culture in Canada, some overreaching values are common to most Indigenous communities. This connection is particularly evident in relation to the environment and humanity’s role within it.

Indigenous peoples living in Canada possess a deep and spiritual connection to the land. The Assembly of First Nations (AFN) is a national advocacy group representing the interests of First Nations citizens in Canada. The AFN’s Environmental Stewardship Unit explained the First Nations’ perspective on the environment:

The term ‘environment’ from a traditional First Nations’ perspective does not distinguish between humanity and everything else. Humans are part of the environment as much as are the fish, wildlife, air, and trees. Traditionally, First Nations’ use of the land recognized the impact on other species around us and we were respectful of the impact we imposed. We do not view people as the masters of the earth, but merely a part of the delicate balance of the earth’s cycle of life. We are aware that our lives depend on observing and honouring this balance.

(Assembly of First Nations, Environmental Stewardship Unit “[Overview of Environmental Issues facing First Nations: Context for Participation in Nuclear Fuel Waste Management Issues](https://www.nwmo.ca/en/~/media/Site/Files/PDFs/2015/11/04/17/30/406_11-AFN-10.ashx)” (Background Paper) March 31 2005 at 1).

This perspective extends beyond First Nations’ communities, and beyond Canada’s borders. Article 25 of the [*United Nations Declaration on the Rights of Indigenous Peoples*](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly* 2 October 2007, A/RES/61/295) enshrines and protects this profound connection to the land for the world’s Indigenous communities:

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

This connection brings with it a solemn obligation to honour and respect the earth and sustain it for future generations. This responsibility was explained by Shannon MacPhail, an Indigenous community leader, who said “[w]hen you come into this world, you receive a full basket, and it is your obligation to pass a full basket on to the next generation” (Shannon MacPhail, as quoted within Canada, Minister of Environment and Climate Change, [Building Common Ground: A New Vision for Impact Assessment in Canada, The Final Report of the Expert Panel for the Review of Environmental Assessment Processes](https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf) [EA Expert Panel] at 10).

This stewardship obligation must interact with the varied polycentric needs of modern Indigenous communities, and with the reality of resource development. Sustaining the environment does not mean Indigenous people oppose development. Most Indigenous communities seek to be partners in development, while ensuring that methods and projects undertaken respect their connection and obligation to the air, land, and water (MacDonald-Laurier Institute, [*Protectors of the Land: Towards an EA Process that Works for Aboriginal Communities and Developers,* by Bram Noble and Aniekan Udofia](https://www.macdonaldlaurier.ca/files/pdf/Noble-EAs-Final.pdf) (Ottawa: MacDonald-Laurier Institute, October 2015) [Protectors of the Land] at 14).

#

# Legal Framework

Indigenous communities have found constitutional footing to advance their stewardship interests, flowing from their unique relationship with the Crown. It is this body of law that this Report considers next. After laying out the key concepts in Indigenous law and the Constitutional framework for Indigenous rights in Canada, this Report delves deeper into “the duty to consult” - a valuable tool that Indigenous groups have wielded to advance their land stewardship obligations.

**a. Indigenous Law in Canada**

Indigenous persons in Canada have a unique relationship with the Canadian government. At the time of European arrival and settlement, Indigenous persons were already here, and they were never conquered (*R v Van der Peet*, [1996] 2 SCR 507 at para 30 [*Van der Peet*]; *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 at para 69 [*Tsilhqot’in*], *Royal Proclamation* (1763), R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*]). As such, the Crown’s assertion of sovereignty over what is now Canada is subject to pre-existing Indigenous rights (*R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*], *Royal Proclamation*). Some of their pre-existing rights were surrendered and codified in treaties, while others were not. Some of these rights were unilaterally extinguished by the Crown prior to 1982, but many remain (*Haida Nation v British Columbia (Minister of Forests*), [2004] 3 SCR 511 at para 25 [*Haida*]).

These existing rights and treaties must be reconciled with the Crown’s exercise of sovereignty over lands in Canada (*Haida* at para 17). Finding a just settlement of Indigenous rights and title claims takes place within a broader need to reconcile the relationship between Indigenous persons and the Canadian government, which has a “long history of grievances and misunderstanding“ (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), [2005] 3 SCR 388 at para 1 [*Mikisew Cree*])*.* This goal of reconciliation–from a legal, historical and cultural standpoint–has become the cornerstone of Indigenous law in Canada.

This distinctive relationship was codified in 1982 with the addition of section 35 of the *Constitution Act*, 1982. Section 35 recognizes and affirms existing aboriginal and treaty rights that had not been extinguished prior to 1982:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35 provides a constitutional framework by which the process of reconciliation can take place (*Sparrow* at 1105). It has subsumed the pre-existing core precepts of Indigenous law and elevated those principles to a constitutional status. As such, s. 35 is treated as having procedural and substantive components (*Mikisew Cree* at para 57):

* Substantively, it protects existing and unextinguished Indigenous rights and title claims. The Crown is entitled to restrict or infringe Indigenous rights only where those actions are properly justified (*Sparrow* at 1109-1111).
* Procedurally, the Crown must act honourably in all its dealings with Indigenous persons, which necessitates a duty to meaningfully consult with Indigenous communities when contemplated Crown action has the potential to adversely impact an Indigenous community.

The honour of the Crown is a standard of conduct imposed on federal and provincial governments in all their dealings with Indigenous persons (*Royal Proclamation*; *Sparrow*). It is used as an interpretive tool to fill in gaps in historical treaty interpretation, and it guides all dealings between the government and Indigenous persons today (*Haida* at para 32).

The honour of the Crown imposes considerable obligations on government conduct and treatment of Indigenous persons in Canada. In particular, it creates a proactive obligation on the Crown to meaningfully consult with Indigenous groups when contemplating conduct that could negatively impact potential or established Indigenous or Treaty rights (*Haida* at para 35; Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishin Ltd, 2014) at 51 [*Newman*])*.* Where necessary, the duty requires the Crown to modify their actions to accommodate Indigenous interests (*Haida* at para 47).

**b. The Duty to Consult**

The modern framework for the duty to consult is enshrined in the landmark *Haida* decision. In that case, the British Columbia provincial government issued a tree farm licence to a private logging company. The Haida Nation claimed title to the land, but their claim was not yet proven in Court. The province moved forward with transferring the tree farm licence with knowledge of the unproven claim, and over the objections of the Haida people. It did not consult with the Haida people before taking action.

The Supreme Court of Canada held that the Crown (as represented by the province) acted improperly. The province had knowledge of a credible but as-yet unproven claim regarding the land at issue, and they were obligated to respect those potential rights. While the province may move forward with development despite unproven claims, it was not honourable for the province to “unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource” (*Haida* para 27). The Haida people were owed a duty of meaningful consultation, and possibly, an accommodation of their interests.

Meaningful consultation is not a guarantee of a favourable outcome (*Tsilhqot’in* at para 78). Following meaningful consultation, the Crown may still proceed with a course of action of the objection of impacted Indigenous communities (*Mikisew Cree* at para 66). The Crown must, however, undertake consultation with an open mind and a genuine effort to incorporate other viewpoints, respond to and mitigate concerns, and reconcile differing interests.

The duty is a process of good faith discussions, the extent and content of which will vary depending on the circumstances, but which always must be undertaken:

* “with the intention of substantially addressing the concerns of the aboriginal people whose lands [or rights] are at issue” (*Mikisew Cree* at paras 57, 59; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168]; and
* “willingness on the part of the Crown to make changes based on information that emerges during the process” (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 29 [*Taku River*]).

Discussions undertaken as part of the duty to consult may reveal an obligation to accommodate the interests of Indigenous groups (*Mikisew Cree* at para 54). The duty to accommodate will exist when there is a strong *prima facie* claim, and the proposed activity in question is likely to cause significant adverse effects (*Haida* at para 47).

While the duty to accommodate appears to provide substantive guarantees, Courts have ruled it can be satisfied by engaging in negotiation, compromise and compensation (Alastair Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) Osgoode Legal Studies Research Paper Series 122 at 10 [*Craik*]). The Federal Aboriginal Consultation and Accommodation Guidelines take the position that “[t]he primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts” [emphasis added]. Canada, Aboriginal Affairs and Northern Development Canada, [Aboriginal Consultation and Accommodation: Updated Guidelines for Government Officials to Fulfill the Duty to Consult - March 2011](https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729) (Policy Guidelines) at 53).

**c. Triggering the Duty to Consult**

The duty to consult is triggered “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it” ([*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*](https://www.canlii.org/en/ca/scc/doc/2010/2010scc43/2010scc43.html), 2010 SCC 43 [*Rio Tinto*]).  The threshold is low and can be broken down into three elements:

1. Crown knowledge, actual or constructive, of a potential Aboriginal claim or right;
2. contemplated Crown conduct; and
3. potential that the contemplated conduct may adversely affect the Indigenous claim or right.  (*Rio Tinto* at para 31)
* Knowledge: The Crown has actual knowledge when there are ongoing negotiations, pending court claims, or express treaties to that effect (*Mikisew Cree* at para 34). Actual knowledge of a “credible but unproven claim” will trigger the duty to consult (*Haida* at para 37). Constructive knowledge exists where “lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated” (*Rio Tinto* at para 40; Newman at 45).
* Conduct: The duty is triggered when the Crown contemplates an *action* or *decision* that may adversely impact Indigenous rights. This is interpreted broadly. It is not limited to “decisions or conduct which have an immediate impact on lands and resources.” It also encompasses “strategic, higher level decision[s]” (*Rio Tinto* at para 69).
* Adverse Effect: The contemplated action must have the potential for an “appreciable” adverse impact on an Indigenous right or claim to trigger the duty (*R v Douglas*, 2007 BCCA 265, 278 DLR (4th) 653 at para 44). There must be a “demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right” (*Rio Tinto* at para 51). Abstract or theoretical effects, or ones that would require a series of remote causal chain of events, do not trigger the duty (see, for example, *Hupacasath First Nation v. Canada (Attorney General), 2015 FCA 4* [*Hupacasath*]).

**d. Content of the Duty to Consult**

Once the duty to consult is triggered, context shapes what the duty looks like in a particular case. In some cases, the duty to consult is little more than a duty of notice. In others, it will require extensive meetings, and ultimately, accommodation of Indigenous interests.

*Haida* explained that the content of a consultation is dependent on the asserted claim’s strength and the extent to which the claim may be adversely affected by the governmental decision or action:

39  The content of the duty to consult and accommodate varies with the circumstances…In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The content of the duty is a spectrum. What the consultations look like will depend on where particular case falls on that spectrum. As explained in *Haida*:

43  …At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor.  In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice…

44  At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.  In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.  While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.  This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations.  Every case must be approached individually.  Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light.  The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.  Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.  The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.  Balance and compromise will then be necessary.

This spectrum approach is premised on the ability to craft meaningful consultations that respond to the particular situation on the ground. This individualized approach is one that has reconciliation as a goal.

**e. Duty to Consult and Land Stewardship**

The duty to consult is a powerful tool for Indigenous communities to advance their land stewardship interests. Indeed, it has been argued that the procedural duty has become even more valuable than the substantive protections demanded by s 35 (*Newman* at 17). Even though the right does not guarantee substantive outcomes, there is evidence that the doctrine can lead to “major modification to protects or even cancellation of projects that would have unacceptably severe impacts on Aboriginal communities” (*Newman* at 105).

There are several features of the duty to consult that are especially valuable in the context of Indigenous land stewardship obligations.

* First, it is preventative. The duty “offers some core protection to Aboriginal rights, even where they have not yet been definitely established” (*Newman* at 17). Its preventative nature requires engagement before harm occurs, and before Indigenous title is proven. This protects a resource from being depleted while parties argue over it in Court.  A preventative obligation allows the duty to consult stand independently from substantive proof.
* Second, it is a proactive obligation. The duty rests with the Crown – it is not incumbent on impacted communities to approach the government first. This has mandated the development of comprehensive federal and provincial frameworks to meet their obligation. As discussed in more detail below, it has also lead to the development of participant funding programs and community engagement initiatives aimed at effecting meaningful consultation with Indigenous communities.
* Third, it imposes a high standard of conduct on the Crown. The honour of the Crown does not accept narrow, legalistic or “sharp” interpretation of consultation. Judges have demonstrated a willingness to enforce this high standard, leading to a number of important successes for Indigenous groups (see, for example, *Mikisew Cree, Haida, Clyde River (Hamlet) v Petroleum Geo‑Services Inc*, 2017 SCC 40 [*Clyde River*]).
* Fourth, it is flexible enough to meet differing needs. Context guides the form and substance of consultation. This creates space for creative solutions, including joint management of projects between Indigenous groups and the Crown, Indigenous lead development, and investment in Indigenous communities (see, for examples, case studies in MacDonald-Laurier Institute*,* [*Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment*](https://www.macdonaldlaurier.ca/files/pdf/Noble_StewardshipCaseStudies_F_web.pdf)*,* by Bram Noble (Ottawa: MacDonald-Laurier Institute, July 2016), [Learning to Listen] at 10-23).

There are, however, a number of problems that exist within the duty to consult framework. Some of these challenges are considered below.

**f. Challenges with the Duty to Consult**

*1. The Duty to Consult does not redress past wrongs*

The duty to consult cannot be used to remedy past wrongs. Given the significant environmental degradation that has already occurred in Indigenous communities, this is a painful shortcoming for many Indigenous communities. This question was at issue in the *Rio Tinto* decision, where an Indigenous group argued they were owed a duty of consultation when the provincial utilities commission renewed energy agreements in relation to a dam. That dam had originally been constructed in the 1950s without any meaningful consultation, and it had negatively impacted their rights. The impacted communities argued that it should not have been approved because they were not consulted, and because the proponent was unfairly benefiting from a historic infringement. The Supreme Court of Canada disagreed.  Notwithstanding the historic infringement, the current approval did not trigger the duty to consult because it did not impact on the Indigenous community (*Rio Tinto* at para 83):

The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice (*Rio Tinto* at para 45).

The frustration within Indigenous communities is amplified by the cumulative impacts of development. The consultation process is triggered by specific decisions or actions. While the impact of that one decision may be limited, when considered cumulatively with past developments, the impact can be profound (*Brokenhead Ojibway Nation v Canada (Attorney General),* 2009 FC 484 (Canlii) at para 28). The forward-looking nature of the duty to consult limits the ability to re-examine prior developments, and how they cumulatively impact Indigenous rights, title, and the environment.

*2. The Limits of Process*

The duty to consult does not guarantee development plans will be changed, and it does not give Indigenous communities a veto power over development. This was at issue in the *Taku River* decision. In that case, a mining company sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation objected to a portion of the plan dealing with land over which they had a strong *prima facie* title claim. They participated in an environmental assessment process, during which they raised their concerns. Ultimately, the Province approved the mining company’s plan with some accommodation for the concerns raised. The Taku River Tlingit First Nation opposed this result, and launched a court action challenging the decision. They were not successful. The Supreme Court of Canada explained that “[w]here consultation is meaningful, there is no ultimate duty to reach agreement” (*Taku River* at para 2).

The inability to translate the duty to consult into tangible results significantly hampers Indigenous stakeholders engaged in consultation. It has led some to criticize the process as an empty one (*Newman* at 105).

*3. Determining Consultation Partners*

The duty to consult is a community right (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 30 [*Behn*]). As such, consultations are often held, or at least coordinated, with the governing leadership of potentially impacted communities. This assumes that Indigenous communities operate on the same structure as their non-Indigenous counterparts, and that there is always agreement within an Indigenous community regarding the proper parties to consultation. This is particularly contentious when the burden of development is borne disproportionately by a subset of community members.

Such was the case in *Behn*. There, the plaintiffs were a family that stood to disproportionately suffer the negative consequences of a logging contract. The contract was granted after consultations were conducted, but the Behn family argued that they were owed a right of individual consultation. The Supreme Court of Canada disagreed and the case was dismissed.

Identifying consultation partners is increasingly complicated when dealing with large scale and complex projects such as interprovincial pipelines. Indeed, during the approval process for the Mackenzie gas pipeline, an Indigenous consultation partner was not even notified, much less consulted in the creation of a coordinated plan for proceeding with the project among regulators (see *Craik* at 39, discussing *Dene Tha' First Nation v Canada (Minister of Environment),* 2006 FC 1354 (CanLII) at para 3).

*4. Difficulty Moving Beyond Legal Necessities*

There is a difference between legally acceptable consultation and good consultation (*Newman* at 114). Since the *Haida* decision, the Crown has struggled to shift its perspective from one based on legal necessities and towards genuine reconciliation. This difficulty has led to a series of missteps and miscalculations that have increasingly driven Indigenous communities to Court for their rights to be adjudicated (see, for example *Clyde River*, discussed below). This increasing legalisation further hinders the reconciliatory goals of consultation, and has bred distrust in an already fraught relationship. As put by the Supreme Court of Canada in *Mikisew Cree*:

[1] The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.  The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.  The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

If the goal is reconciliation, all parties need to move beyond checking the appropriate boxes and towards long term good faith relationship building.

**g. Evolution of the Duty to Consult: International Law Considerations**

The duty to consult is continually evolving. Canada’s recent decision to adopt the *UNDRIP* without qualification will shape the next phase of this evolution.

The *UNDRIP* is an international general declaration. It is not a legally binding document in its own right. The provisions of the *UNDRIP* become part of Canada’s laws in two ways:

* They are explicitly incorporated into domestic laws through legislation.
* The provisions guide and influence the development of the common law (judge made decisions).

As a full supporter of the *UNDRIP*, Canada has confirmed that it is “committed to a renewed, nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership” ([Indigenous and Northern Affairs Canada](https://www.canada.ca/en/indigenous-northern-affairs.html), “United Nations Declaration on the Rights of Indigenous Peoples” 2017). It is now embarking on the process of harmonizing Canada’s laws with those concepts espoused in the *UNDRIP*.

The *UNDRIP* outlines the rights of Indigenous peoples in respect of a wide range of matters including culture, religion, identity, education, health, language, and community. Many articles of the *UNDRIP* are relevant to land stewardship and the duty of consultation.

Under the *UNDRIP*, Indigenous peoples have the right to:

* Participate in decision-making in matters which would affect their rights (Article 18)
* Maintain and develop their own Indigenous decision-making institutions (Article 18)
* Control and Protect Indigenous knowledge (Article 31)

The UNDRIP affirms that all States shall:

* establish and implement… ‘a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources… Indigenous peoples shall have the right to participate in this process’ (*UNDRIP* at Article 27).
* **‘consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources’ (*UNDRIP* at Article 32(2) [emphasis added])**

Article 32(2)’s direction regarding “free, prior and informed consent” is a significant and highly politicized shift from Canada’s current law. Canadian courts and lawmakers have, thus far, rejected the notion that the duty of consultation requires Indigenous consent before proceeding with a project (*Haida* at para 48).

It remains to be seen how Canada will incorporate Article 32(2) into law. While the federal government has “recognize[d] [the *UNDRIP*] as a full box of rights for Indigenous Peoples in Canada” that will “breath[e] life” into s 35, many remain skeptical regarding the government’s approach to Article 32(2) (The Honourable Carolyn Bennett Minister of Indigenous and Northern Affairs, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” delivered at the United Nations Permanent Forum on Indigenous Issues (10 May 2016) at 7).

There are, however, indications that Canada’s Court are inching towards consent, in exceptional circumstances. In 2014 (prior to Canada’ adoption of the *UNDRIP*), the Supreme Court of Canada heard a substantive title claim under s 35 in *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 [*Tsilhqot’in Nation*]. For the first time outside a reserve context, the Court declared Aboriginal title over the lands in question (over 1900 square kms). This granting of title conferred many rights. As the Court explained:

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including:  the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

…

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.  If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35  of the Constitution Act, 1982.

In other words, where Indigenous title exists, the government cannot merely consult with impacted groups before proceeding with development. They must either obtain consent for development, or justify their intrusion onto those lands under the much more stringent threshold for substantive breaches under s 35 ((1) fulfilling the duty to consult and accommodate; (2) possessing a compelling and substantial objective; and (3) demonstrating their action is consistent its fiduciary obligation to the group (*Sparrow*)) (*Tsilhqot’in Nation* para 80).

While *Tsilhqot’in Nation* discusses the need for Indigenous consent in the case of established title, it retained the Crown’s authority to act without consent. Thus, prior to adopting the *UNDRIP,* Canada’s lawmaking powers were unwilling to compromise on decision making power. It remains to be seen how the adoption of the *UNDRIP* will impact this dynamic.

As Canada seeks to implement the principles embodied in the *UNDRIP* into Canadian law, there are significant opportunities to strengthen environmental protections through Indigenous land stewardship. The *UNDRIP*’s adoption and implementation will provide arguments and opportunities for increased participation and advancement of Aboriginal land stewardship into the future.

**h. Conclusion on the Duty to Consult**

Indigenous land stewardship interests find concrete constitutional footing under the duty of consultation and accommodation. While it has limits, the proactive and preventative nature of the duty lends itself to protecting environmental interests. As well, its evolution provides promise for a heightened role for Indigenous groups in final decision making power.

This Report next turns to consider the practical realities of the duty to consult when it interacts with environmental interests. This necessitates a consideration of the mechanism by which the government seeks to satisfy its duty—the environmental assessment process. As explained below, while environmental assessment began as a technical tool for evaluating environmental impacts of development, it has since developed a role as the “critical tool on the front lines of conflict and reconciliation between Indigenous groups, governments and developers” (Learning to Listen at 2).

# Recommendations

In light of the above, this Report makes the following recommendations. These changes will remove hurdles to consultation within EA processes, and allow for more effective integration of Indigenous perspectives.

**a. Front-End Engagement**

Indigenous communities must be engaged earlier in project design in order to meaningfully incorporate their perspectives. “Experience has shown that engagement with Aboriginal groups early in the planning and design phases of a proposed project can benefit all concerned. Conversely, there have been instances where failure to participate in a process of early engagement with Aboriginal people has led to avoidable project delays and increased costs to proponents” (Protectors of the Land at 19).

Some proponents are already engaged in this front-end engagement, with positive results. For example, Bram Noble cited the Orca Sand and Gravel mine approach as successfully integrating Indigenous views early in a project conceptualization stage. He provides a snapshot of how this early consultation can benefit all parties:

Polaris  [the proponent] approached the ‘Namgis [the Indigenous community]… approximately three years before the EA process commenced and prior to the conceptual design and planning stages of the project, in an effort to develop a working relationship and seek permission to explore on their traditional territory. An exploration and access agreement was subsequently drafted, identifying important traditional use areas and ‘Namgis’ values. The agreement gave the ‘Namgis power to veto the project up to the conceptual design stages of the mining operation and paved the way for the Orca Sand and Gravel Limited Partnership with the ‘Namgis obtaining a 12 percent interest in the project (Natural Resources Canada 2010).

The ‘Namgis were also involved in drafting the terms of reference for the EA, which commenced in 2004, hiring the consultants who would ultimately undertake the project’s technical assessment, and in choosing how they would participate and be engaged throughout the EA process. During the EA, the Orca Sand and Gravel Project Working Group was formed, composed of representatives of federal, provincial, and local government agencies and the First Nation, to identify issues and concerns and provide information in support of the EA process. Aboriginal values were incorporated directly into the project EA (CIER 2009).

MacKay (2012) reports that early relationship building and collaboration between Polaris and the ‘Namgis, long before the conceptual design stages of the project and commencement of the EA process, resulted in the integration of ‘Namgis values in the project design, EA process, and subsequent impact mitigation options. The ‘Namgis provided a letter in 2005 in support of the EA, indicating that it had been adequately consulted and accommodated by the proponent and by the respective provincial and federal governments. The project was approved and commenced operations in 2007. (Learning to Listen at 12)

The Expert Reports and Discussion Paper acknowledge this failing, and recommend building a preliminary planning phase into the EA process. This preliminary phase maintains the clear notice of the existing system regarding the need for consultation. However, it pushes the consultation back into the planning phase of the project, so Indigenous communities can participate and incorporate their knowledge into project design (NEB Expert Report at 54; EA Expert Panel at 18, Discussion Paper at 10, Protectors of the Land at 17).

This Report endorses this recommendation.

**b. Increase Stakeholder Capacity**

In order to effectively engage in the EA process, Indigenous communities need increased and better targeted investment.  Governments and proponents must do more to build short and long term capacity in Indigenous communities.

First, there needs to be enhanced funding for the EA process itself (EA Expert Report at 39). While programs like the Participant Funding Program already exist, this is not enough. As explained by Bram Noble:

An overwhelming allocation and use of participant funding tends to be the funding of legal support for potentially affected Aboriginal interests to review a proponent’s project impact statement and appear before a formal review panel to defend their claims about a project’s impacts or benefits…[F]ormal participant funding is “often limited to covering travel and participation expenses and remains insufficient to ensure meaningful participation”.

(Protectors of the Land at 17).

Funding should be better targeted to build long term capacities (Discussion Paper at 20). This would include the development and administration of EA training programs to build personnel, educational and technical capacity in Indigenous communities (Protectors of the Land at 16). In many Indigenous communities, effective engagement requires a trained and dedicated staff with adequate technical resources. More work should be done to build this expertise and infrastructure within the community. Where this isn’t available, there must be funding opportunities to retain external experts to participate in reviews on their behalf (EA Expert Report at 43).  This increased investment will help ensure, in the long term, that communities have the knowledge and skills to engage in EA processes (Protectors of the Land at 16).

There should also be an effort to enhance effective communication within and among different stakeholders:

* Bolstering the ability of Indigenous communities to coordinate with one another can help Indigenous groups identify areas of concern and build consensus.
* Building expertise and understanding of Indigenous rights within government and responsible government agencies will enhance the consultation process (Discussion Paper at 20).

**c. A Holistic Approach**

EA regimes often adopt an isolated perspective – they focus on a single project and its impact on the biophysical environment. While mechanisms exist for adopting a wider lens, they are underutilized. By aligning EA to more accurately reflect its impact on the world around us, we increase the space for integrating Indigenous perspectives to fit within that space.

* By extending EA beyond the bio-physical environment to consider all impacts (social, economic, cultural or other impacts), it is possible to establish a more holistic and realistic understanding of a project. This approach is more in keeping with the Indigenous interconnected approach to environment and all of humanity (EA Expert Report at 13).
* The project-specific focus of EA is unduly limited and frustrates attempts by Indigenous communities to uphold their land stewardship obligations. By increasing the role for regional and/or cumulative impact assessments, environmental concerns raised by Indigenous communities (and others) can be more effectively addressed. Such an approach will require “a new way of thinking that prioritizes collaborative planning and decision-making with Aboriginal communities over issuing permits for project development” (Protectors of the Land at 21; Getting the Big Picture).

**d. Wider Community Engagement**

Current consultation practices rely too heavily on elected officials, rather than the wider community. This has led to conflict within communities, particularly where private contracts (IBAs) are signed, or where developments negatively impact some members of the community more than others (*Behn*). To better harness the knowledge held by that community, wider engagement should be expected to satisfy consultation obligations.

This shift would require buy-in from local community leaders, proponents and government.  An open and transparent process can avoid disagreement and frustration down the road. Ensuring community elders are heard can also increase the quality of Indigenous knowledge gathered from the community.

**e. Make Science Independent**

To maintain the integrity of the EA system, the science within it must be objective. Perceptions of bias undermine the validity of EAs and undercut the process of reconciliation. There are various ways to ensure that science remains independent in an EA:

* Have the agencies in charge of overseeing EAs conduct their own Environmental Impact Assessments. The exclusive use of proponent commissioned science raises questions about the quality of EA reports and the use of biased data (EA Expert Report at 45).
* Allow for the independent representation of environmental interests before responsible authorities. It is unfair to place the burden of environmental protection on Indigenous communities and environmental groups. Having independent environmental advocacy would ensure that the science in an EA is rigorously challenged by an objective and fully-funded party dedicated to environmental interests.

There are several ways this can be achieved. The New Zealand government passed legislation granting legal standing to a sacred river permitting it (through its Maori and government representatives) to launch an action or participate in hearings in a way similar to a minor (Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ), 2017/7; Eleanor Ainge Roy, “[New Zealand river granted same legal rights as human being](https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being)” The Guardian (156 March 2017). It would also be possible to ensure environmental issues are adequately raised in EA hearings through the appointment of independent environmental advocates before panels.

**f. Government Boots on the Ground**

While there are sound practical and economic reasons for relying on proponents to conduct consultations, government should not delegate away all meaningful contact with Indigenous communities (NEB Expert Report at 51). This practice has created significant confusion within Indigenous communities, and does not advance reconciliation.

Bram Noble has suggested an alternative approach that calls for government outreach prior to dealing with proponents. He writes:

In any region subject to a potential application for development, and before any particular project is being considered, the responsible government departments or agencies should be the first on the ground, working with local communities to identify needs, opportunities, and to help set expectations about development and EA processes. This should happen before project proponents enter the scene (Protectors of the Land at 19).

This approach gives the government and Indigenous communities the opportunity to identify issues that need to be addressed – including those that fall outside the EA process.

**g. Embrace the UNDRIP**

Currently, there is no process or guidance to reflect the principles of the *UNDRIP* within existing EA processes. This will change given Canada’s decision to adopt the *UNDRIP*, either proactively by the government, or reactively through Courts (Coates and Favel at 22). The more reconciliatory proactive approach can be advanced through the following changes.

*1. Integration of Indigenous Government, Knowledge, and Processes*

Current EA structures do not adequately integrate or apply Indigenous perspectives, knowledge, or institutions into their decision-making structures (NEB Expert Report at 54). As Canada moves towards implementing the *UNDRIP*, this shortfall must be remedied.

* Knowledge: States are required to respect Indigenous knowledge (the *UNDRIP* at Preamble, Article 31)*.* Currently, it is common for EAs to ignore Indigenous knowledge altogether, or confine it to an isolated appendix. When it is considered, it is often collected by a proponent’s consultants and applied outside its cultural and spiritual context, with the goal of limiting the Indigenous communities’ claims (Coates and Favel). [[1]](#footnote-1)
* Institutions: Federal and provincial EA structures should support Indigenous jurisdiction, and must do more to recognize and respect Indigenous institutions and processes (EA Expert Report at 25). Recognition of and support for Indigenous jurisdiction and processes should be built into the EA process. Indigenous communities that wish to undertake their own EAs processes should be able to do so, and the Crown should be involved in negotiating these arrangements. EA processes should be flexible enough to reflect Indigenous traditions, processes and laws (EA Expert Report at 25).

*2. Indigenous Voices Must be Part of Substantive Decision Making*

Governments and industry should increasingly consider co-management of EA processes and monitoring as a viable option for accommodation. Co-management involves transferring some decision making authority away from government and into an Indigenous community (Canadian Institute of Resources Law, [Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples](https://prism.ucalgary.ca/bitstream/handle/1880/48941/CoManagementOP38w.pdf;jsessionid=EBA2471924A2B163514822178EF01452?sequence=1), by David Laidlaw and Monique M Passelac-Ross (Calgary: Canadian Institute of Resources Law University of Calgary, 2012) [Laidlaw] at 3).

This can be a pragmatic way to more effectively incorporate Indigenous values, increase capacity, and move towards reconciliation.

According to Laidlaw, effective co-management requires:

* A power sharing arrangement that gives local co-managers substantive decision making powers;
* A vision that is grounded in sustainability and informed by western and Indigenous knowledge
* An intent to provide socio-economic returns to the Indigenous and local communities and the government (Laidlaw at 40)

Co-management may not always be a feasible option. There are other ways, however, to ensure that Indigenous voices are a substantive part of decision making and oversight. As suggested by the NEB Expert Panel, “Indigenous communities should be given a greater hand in the EA determination process, and with oversight... There may also be a role for mandating that there be Indigenous representation on EA review panels or commissions” (NEB Expert Report at 24). Indigenous representation on EA panels could builds bridges between all parties, ensure Indigenous perspectives are heard, and build capacity within the EA panel itself to understand and incorporate Indigenous knowledge.

*3. Disclose the non-financial details of IBAs*

“Consistent with the principles of *UNDRIP*, Indigenous Peoples have a right to share in the economic benefits from resource development on their traditional territories in accordance with their own needs, laws, cultures and interests” (EA Expert Report at 35). However, while there are many benefits to IBAs, they pose legal, environmental and cultural problems:

* They are typically signed prior to an EA being completed. This means that decisions can be made in the absence of free, prior and informed consent (Article 32(2)).
* Support for projects is given based on a number of promises that address certain (and possibly competing) concerns for the community. This may not include adequate environmental protections.
* IBAs are private. Their details may not be known to members of impacted communities. This can breed distrust and frustration within a community.

In order to remedy these concerns, this Report agrees with the recommendation of Bram Noble and Aniekan Udofia, wherein they state that “the content of those [IBAs] pertaining to impacts and impact management strategies – but not financial details – needs to be transparent and made publicly available to other affected communities, to review panels, and to decision-makers” (Protectors of the Land at 3). This disclosure will help ensure that the scope of an agreement (and assumptions upon which it was made) are understood and can be properly addressed through the EA process. It will also increase stakeholder accountability and encourage open discussion of environmental impacts.

*4. Open Decision Making*

EA decision-making can be politicized, opaque and removed from impacted communities. This not only undermines the legitimacy of the process, it contradicts Article 32(2)’s guarantee of free, prior and informed consent (FPIC), and Article 27’s guarantees regarding transparency.

*a.      FPIC: Article 32(2)*

There is considerable ambiguity regarding what “free, prior and informed consent” will look like in Canada. In his 2009 Annual Report to the Human Rights Counsel, the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People expressed the opinion that FPIC “should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples.” (UN General Assembly Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, [*Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*](https://undocs.org/A/HRC/12/34), 15 July 2009 [accessed November 16, 2017] at para 46).

This approach sees consent as a goal, rather than a command. While this is more palatable to governments then conferring a Indigenous groups with a veto power, it may not go far enough to truly encompass FPIC. It is, however, a workable first step in aligning EA processes with the *UNDRIP.*

The EA Expert Panel and the NEB Expert Panel have arguably been more aggressive than the Special Rapporteur in their recommendations to move towards FPIC. Among other things, the EA Expert Report recommends that Indigenous persons be entitled to “reasonably” withhold consent for projects, and that this reasonableness be assessed by an independent body (EA Expert Report at 29; Coates and Favel at 24).

This report endorses both of these approaches, with the caveat that free, prior and informed consent will evolve and require reassessment as it becomes part of Canadian law.

*b. Transparency: Article 27*

To increase transparency “[b]road, unstructured discretionary government powers over EAs must be withdrawn in favor of a transparent process with clear, easily understood requirements.” United Chiefs and Councils of Mnidoo Mnising, “Review of Environmental Assessment Processes”.

While governments are unlikely to withdraw entirely from the decision making process, there are avenues to increase transparency while maintaining democratic accountability. For example, the National Energy Board has suggested that politicians make their public interest decision prior to undertaking the EA process (NEB Expert Report at 21). In this way, politicians maintain a say in projects, but they cannot overrule the EAs findings (NEB Expert Report at 22).

Less drastic methods to increase are also possible. To start, requiring Cabinet provide detailed written reasons for all EA decisions would provide a clear understanding to interested parties, and form the basis for an application for judicial review.

# Conclusion

The changes outlined above require a shift in structure, perspectives, and power. By removing barriers to Indigenous participation in EAs, the government builds social licence for responsible development, aligns its practice with the spirit of meaningful consultation, and signals its dedication to reconciliation. By more effectively incorporating Indigenous perspectives into environmental assessment, Canadians will not only improve our environment, we help redefine the relationship Canada has with Indigenous peoples.

# Appendices

**Appendix A**

**Additional Case Info on Duty to Consult**

1.      *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73

In *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 the Haida Nation alleged that the provincial government acted improperly in failing to consult it before transferring a tree farm licence from one forestry company to another. They had claimed, but had not proven, Indigenous rights and title to the lands impacted by this transfer.  The Province argued that, until the claims were proven, it had no duty to consult with the impacted groups.

The Supreme Court held that the provincial government had acted wrongfully. The provincial and federal governments have a duty to consult Indigenous peoples when it contemplates action that may adversely affect asserted Indigenous rights or title claims. These rights do not have to be proven for the duty to consult to be triggered. As a result of those consultations, there may be a duty to accommodate the Indigenous rights or claims.

The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Indigenous claim or Indigenous or treaty rights that may be adversely affected by Crown conduct. The nature and extent of the consultation will depend on the asserted claim’s strength and the extent to which the claim right may be adversely affected by the governmental decision or action.

The court set out the following principles in respect of the duty of consultation:

* consultation must be proportionate to the degree of infringement that will occur;
* there must be flexibility regarding the depth of consultation;
* the honour of the Crown requires a meaningful, good faith consultation process;
* reconciliation is promoted by imposing obligations on the manner and approach of the government;
* the duty to consult rests with the Crown; it is not owed by proponents. However, the Crown may delegate procedural aspects of consultation to proponents.
* written reasons will foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed, and
* procedural protections may be required for meaningful consultation.

2.      *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*]

In *Clyde River*, the SCC considered whether the National Energy Board (NEB) had fulfilled the Crown’s duty to consult. It dealt with offshore seismic testing conducted near Baffin Island. The local Inuit population had treaty rights to harvest marine animals in that area. Some consultation efforts, including community meetings, were held with the impacted persons. The NEB determined that adequate consultation had been conducted and that significant adverse environmental effects were not likely. It approved the project and the impacted community filed the action alleging a breach of the duty to consult.

The Court unanimously ruled that, while the NEB is capable of conducting and discharging the Crown’s consultative duties, it had failed to do in this case. The NEB failed to adequately consult impacted communities or assess the impact on treaty and Indigenous rights of the proposed oil and gas exploration project before approving it. The Court based its decision on a consideration of the principles developed in a number of cases. In *Tsilhqot’in*, the court ruled that the duty to consult must be fulfilled prior to the action that could adversely affect the right. In *Carrier Sekani*, the court ruled that the legislation empowers regulatory bodies to fulfill the Crown’s duty to consult; that consultation is “concerned with an ethic of ongoing relationships”, and that the goal of consultation is to identify, minimize, and address adverse impacts.

Adequate consultation could include a number of things depending on the individual case and the circumstances. The SCC listed a number of factors that contribute to adequate consultation, but it is not limited to just these factors. In fact, a combination of these factors is most likely needed to achieve adequate consultation. The Government of Canada should always be striving to do the best that they can to fulfill as many factors as possible.

* The level and depth of consultation must be decided upon.
* A consultative inquiry is to inquire into the impact on the right, and not just on the environmental effects.
* The process needs to be adequately explained to the Indigenous group, specifically about who (which regulatory body, government department, etc.) is fulfilling the Crown’s duty to consult.
* If deep consultation is required, it may entail an opportunity by the Indigenous group to make submissions for consideration—this may also involve provision of resources to do so.
* Opportunity to test the evidence of proponents.
* Formal participation in the decision-making process.
* Provision of written reasons.
* Opportunities for participation and consultation, which include oral hearings and participant funding.
* Procedural safeguards while not always necessary, can be important – such as meaningful responses to questions or concerns, translation of documents, availability of documents in print and not just online since that may be inaccessible.
* The accommodations are legitimate concessions.

3.      *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41

*Chippewas* was heard and released concurrently with released *Clyde River*. In this case, however, the Supreme Court held that consultations between the NEB and the Chippewas of the Thames First Nation were adequate to discharge the duty to consult.

In both cases, the SCC ruled that the NEB is capable and allowed to fulfill the Crown's duty to consult Indigenous groups about development projects in their traditional territories, as long as that consultation is robust.

4.      *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69

In *Mikisew Cree,* the Supreme Court ruled that even if the Crown’s duty of consultation lies at the lower end of the spectrum, the Crown must still provide notice and engage directly with the affected Indigenous communities. This engagement includes “the provision of information about the project, addressing what the Crown knew to be the [First Nation group’s] interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the [First Nation’s] concerns, and attempt to minimize adverse impacts on its treaty rights” (para 64). If the Crown makes unilateral decisions without showing that they intend to substantially address any Indigenous concern, then they have failed to discharge their duty of consultation (paras 64-67).

5.      *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*]

*Little Salmon* dealt with a decision by the Director of the Agriculture Branch of the Yukon government to issue an agricultural land grant to a private citizen. The Little Salmon/Carmacks First Nation argued that this grant triggered the duty to consult, and that the consultations undertaken were inadequate. The government argued that a modern treaty can been concluded by the parties and any construct of the duty to consult would be confined within its terms. So long as the terms of that agreement were satisfied, no breach of the duty to consult existed.

The Supreme Court confirmed that the duty to consult still applies when a treaty is in place.  The duty is external to any treaty or agreement – it cannot be confined within the terms of a treaty, nor can the Crown contract out of its duty of consultation. This duty is a “doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself”. The objective of reconciliation can only be achieved if consultation is conducted in a way that upholds the honour of the Crown and manages to maintain the important ongoing relationship between the government and Indigenous community.

6.      *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*]

In *Rio Tinto,* the Carrier Sekani Tribal Counsel argued they were owed a duty of consultation when the British Columbia Utilities Commission renewed energy agreements for energy from a particular dam. That dam had originally been constructed in the 1950s without any meaningful consultation. The impacted communities argued that the approval was not in the public interest because no consultation had been undertaken with them, and that the proponent was unfairly benefiting from a historic infringement.

The Supreme Court of Canada held that, notwithstanding the historic infringement, the present approval was not enough to trigger the duty to consult.

This case clarified the *Haida* explanation on triggering the duty to consult. There are three stages that must exist:

* The Crown must have real or constructive knowledge of a potential Indigenous claim or right. While the existence of a potential claim is essential, proof that the claim will succeed is not.
* There must be Crown conduct or a Crown decision. It encompasses immediate impact on lands and resources to “strategic, higher level decisions” that may have an impact on Indigenous claims and rights.
* There must be a possibility that the Crown conduct may affect the Indigenous claim or right. A causal relationship must be shown between the proposed government conduct or decision and a potential for adverse impacts on pending Indigenous claims or rights.

7.      *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44

In response to proposed logging activities, the Tsilhqot'in Nation launched an action seeking, among other things, a declaration that Aboriginal title existed over a portion of their traditional territory.

The Supreme Court of Canada held that Aboriginal title was established over the disputed territory. Aboriginal title confers many rights of exclusive use and occupation to be held collectively by the Tsilhqot’in people. If the Crown wishes to conduct activities on this land, they must either obtain consent of the Tsilhqot’in people, or justify their infringement under section 35 of the *Constitution* by satisfying three questions:

* Did the government discharge its procedural duty to consult and accommodate;
* Were the government's actions backed by a compelling and substantial objective; and
* Is the governmental action consistent with the Crown's fiduciary obligation to the group?

**Appendix B**

**Detailed EA Processes**

1.      FEDERAL EA PROCESS

Federal EAs are administered by the Canadian Environmental Assessment Agency. EAs are most often completed by the Agency, and in such cases, must be completed within 365 days of commencement. The National Energy Board (NEB) and Canadian Nuclear Safety Board (CNSB) also conduct federal EAs for projects that fall within their regulatory authority. Collectively, the Agency, the NEB and the CNSB are referred to as Responsible Authorities under the *Canadian Environmental Assessment Act*, 2012 (*CEAA*)s 15.

The process can be summarized into 6 stages:

Determining if an EA is required. A proponent submits a project description to the Agency, and the Agency has 45 days to determine if an EA is needed. This determination is made by reference to a schedule of designated projects that are likely to require an EA. This list includes, for example, projects related to the construction, expansion or abandonment of oil sands facilities; offshore drilling; oil refineries; pipelines; mines, nuclear facilities; pulp mills; pharmaceutical processing; dams; and electrical transmission lines. [*Regulations Designating Physical Activities*](https://gazette.gc.ca/rp-pr/p2/2012/2012-07-18/html/sor-dors147-eng.html)*,* SOR/2012-147 ss. 9,10, 14,15, 17, 20, 34. Projects must reach a threshold in size to trigger the EA requirements.

The Agency may determine that an EA is required even if a proposed project does not fall within this schedule. A summary of the project description is posted online for a 20-day public comment period. These public comments are used to help the Agency determine if an EA is necessary. The Agency also considers the description of the project, the potential for adverse environmental impacts, and other regional studies ((*CEAA,* ss 13, 14) Canada, Canadian Environmental Assessment Agency, [*Basics of Environmental Assessment*](https://www.canada.ca/en/impact-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html#gen01) (Government of Canada, 2017) [Basics of EA]).

Draft Environmental Impact Statement: If an EA is required, the proponent must prepare a draft Environmental Impact Statement (EIS), which is posted online for public comment. After the public comment period has ended, the Agency issues Environmental Impact Statement Guidelines. The proponent will modify their EIS in accordance with these guidelines (Basics of EA).

(Optional) Referral and Appointment of Review Panel: The Agency has the discretion if it wishes to proceed with the EA via Review Panel. A Review Panel consists of independent experts selected by the Agency to oversee the EA process.

If no Review Panel is appointed, the Agency or other Responsible Authority continues handling the EA. When the Agency handles the EA, it must be completed within 365 days from the Agency’s decision that an EA is necessary (subject to three month extension).

If a Review Panel is appointed, its Terms of Reference (outlining authority and mandate) are set and opened for public comment prior to that appointment. The EA must be completed within 24 months from the Agency’s decision that an EA is necessary (subject to three month extension).
(Basics of EA, *CEAA* s 38)

Participant Funding Period Commences: The Canadian Environmental Assessment Agency administers a Participant Funding Program, which supports individuals, non-profit organizations and Indigenous groups interested in participating in federal environmental assessments. To be eligible for participant funding, the applicant must demonstrate the value they will add by participating in an environmental assessment and meet at least one of the following criteria:

* Have a direct, local interest in the project, such as living or owning property in the project area;
* Have community knowledge or Indigenous traditional knowledge relevant to the environmental assessment;
* Plan to provide expert information relevant to the anticipated environmental effects of the project; and/or
* Have an interest in the potential impacts of the project on treaty lands, settlement lands or traditional territories and/or related claims and rights

(*CEAA,* s 57; Canada, Canadian Environmental Assessment Agency, [*Participant Funding Application for an Environmental Assessment*](https://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs.html) (Ottawa: Government of Canada, 2017)).

Considering the EIS: The Review Panel/Responsible Authority considers whether or not the proponent’s modified EIS is adequate to present to the public for comment. If inadequate, the proponent is required to provide more information. The EIS will include information on:

* environmental effects, including environmental effects caused by accidents and malfunctions, and cumulative environmental effects
* significance of those environmental effects
* public comments
* mitigation measures and follow-up program requirements
* purpose of the designated project
* alternative means of carrying out the designated project
* changes to the project caused by the environment
* results of any relevant regional study
* any other relevant matter

(Basics of EA)

Public Comment / Public Hearings: Once the EIS is complete, in the case of a Review Panel process, public hearings are held. Where there is no Review Panel, the Responsible Authority posts the modified EIS online for comment.

Report to the Minister: The Review Panel / Responsible Authority drafts a Report based on the EIS. This Report report includes the Agency's conclusions regarding the potential environmental effects of the project, the mitigation measures that were taken into account and the significance of the remaining adverse environmental effects as well as follow-up program requirements. Comments on the Report are solicited, after which it is submitted to the Minister of the Environment.

Minister’s Decision: The Minister decides if the project is likely to cause significant adverse environmental effects. If so, it is referred to the Governor in Council (Cabinet) (*CEAA,* s 52(2)). Cabinet decides if the likely significant adverse environmental effects are justified in the circumstances (*CEAA,* s 52(4). Once this is decided, the Minister issues an environmental assessment decision statement with enforceable conditions. This could include mitigation measures and a follow up program (*CEAA,* s 54).

(Basics of EA)

There are four stages of the process where members of the public are encouraged to participate:

* Determination of whether an EA is required
* Environmental impact statement guidelines (drafted by the Agency)
* Environmental impact statement (drafted by the proponent)
* Report to the Minister (Agency or review panel): the public can comment on the draft environmental assessment report. In the case of a Review Panel, this stage is supplemented with public hearings.

(Basics of EA)

In order to participate in the EA process, members of the public must make themselves aware of opportunities for public comment, public funding and the [Registry](https://ceaa-acee.gc.ca/050/evaluations/?culture=en-CA). Public participants do not necessarily get personal notice of a proposed project unless they are following closely with the projects reviewed by the government.

2.      PROVINCIAL EA PROCESS

The [*Environmental Protection and Enhancement Act*](https://www.qp.alberta.ca/documents/acts/e12.pdf), RSA 2000, c E-12 (*EPEA*) governs environmental impact assessments (EIAs) in Alberta. The *EPEA*’s purpose is to support and promote the protection, enhancement and wise use of the environment (*EPEA,* s 2). In addition, the *Water Act*, RSA 2000, c W-3 governs the regulatory process for any proposed projects affecting the conservation and management of water (*Water Act,* s 2).

Like the federal regime, provincial EIAs are required for certain types of projects that meet a certain threshold. This includes, for example, pulp mills, water reservoirs and dams, power plants, oil sands operations, and refineries that operate within Alberta. *Environmental Assessment (Mandatory and Exempted Activities) Regulation,* Alta Reg 111/1993.

While EIAs are overseen by the *EPEA*, they are the responsibility of either:

* The Alberta Energy Regulator (AER) - for EIAs related to energy resources activities.
* Alberta Environment and Parks - for all other EIAs.

([Alberta Energy Regulator](https://www.aer.ca/protecting-what-matters/protecting-the-environment/environmental-assessments), Environmental Assessments).

The provincial process for environmental assessments can be grouped into 5 steps (Alberta, Alberta Environment and Parks, Alberta’s Environmental Assessment Process (December 2015) (Alberta, Alberta Environment and Parks, 2015) online: [<open.alberta.ca/dataset/25654f70-8686-407b-b683-0a0521ba50d7/resource/2b4f7770-fd7a-499c-a81d-f0ac2fdee8c3/download/environmentalassessmentprocess-dec2015.pdf>](%3Chttps%3A//open.alberta.ca/dataset/25654f70-8686-407b-b683-0a0521ba50d7/resource/2b4f7770-fd7a-499c-a81d-f0ac2fdee8c3/download/environmentalassessmentprocess-dec2015.pdf%3E) [Provincial EA Process]:

Determining whether an Environmental Impact Assessment is Needed: The Environmental Assessment Director receives notice of a new project and determines if the project is one requiring a mandatory EIA or is exempted from an EIA. If it falls under neither heading, the director has discretionary authority to order an EIA. The *Environmental Assessment (Mandatory and Exempted Activities) Regulation* lists the mandatory and exempted activities. If an Environmental Impact Assessment report is required for a project, the Indigenous Consultation Office will also become involved (Provincial EA Process, *EPEA* s 45).

Setting Scope of EIA: If an EIA is required, the proponent will prepare two documents: Terms of Reference, which lays out the information needed for the EIA; and a First Nations Consultation Plan, which directly focuses on the consultation that will take place with potentially impacted Indigenous communities. The proponent will advertise the proposed Terms of Reference to allow for public participation. Once input is received, the Director determines the scope and information required to be included in the EIA Report (Provincial EA Process, *EPEA* s 48).

Technical Review: The proponent submits a finalized EIA report to the Director. A regulatory review is conducted by either Alberta Environment and Parks or the Alberta Energy Regulator, which involves a multi-disciplinary team of provincial experts. The reviewers determine if there are remaining uncertainties, and if the terms of reference have been satisfied. If they have, the EIA report is submitted to the Director. The director then determines if the EIA is complete and refers it to an applicable board, or to the Minister.

Public Interest: If the matter has been referred to the Minister, he or she decides if the project is in the public interest. If it is not referred to the minister, the public interest determination is made by the appropriate Regulatory Board (Alberta Utilities Commission, Energy Resources Conservation Board or Natural Resources Conservation Board). A public hearing may be part of this determination.

Regulatory Approval: If a project is deemed to be in the public interest, the proponent moves forward with other regulatory approvals from applicable departments. This could include, for example, the Regulatory Board, Alberta Environment, Alberta Sustainable Resource Development and potentially several other government departments.

Alberta, Alberta *Environment* and Parks, Environmental Assessment Programs, Frequently Asked Questions (Updated Feb 2010) (Alberta: Alberta Environment and Parks, 2010) online: [open.alberta.ca/dataset/e3cecb9a-a323-4761-9e98-e4be8f1dfe11/resource/53be76bc-a0e7-4baf-b5f3-7bc49312ea4b/download/4897712-2010-environmental-assessment-program-frequently-asked-questions-faq-updated-2010-02.pdf>](https://open.alberta.ca/dataset/e3cecb9a-a323-4761-9e98-e4be8f1dfe11/resource/53be76bc-a0e7-4baf-b5f3-7bc49312ea4b/download/4897712-2010-environmental-assessment-program-frequently-asked-questions-faq-updated-2010-02.pdf) [Alberta EA FAQ].

As with the federal system, public participation is sought at various stages of the approval process. The proponent must advertise notices for public participation throughout the process, whenever it is required. Usually, these notices will appear in several newspapers and at least one Indigenous newspaper when Indigenous consultation is required. The proponent selects the newspaper and the Director gives approval ([Alberta](https://open.alberta.ca/dataset/e3cecb9a-a323-4761-9e98-e4be8f1dfe11/resource/53be76bc-a0e7-4baf-b5f3-7bc49312ea4b/download/4897712-2010-environmental-assessment-program-frequently-asked-questions-faq-updated-2010-02.pdf) EA FAQ).

The public can review the current projects [here.](https://www.alberta.ca/environmental-impact-assessments-current-projects.aspx) There is a list of the current projects, as well as a list of previous Environmental Impact Assessments as well. These can also be viewed in person at the Alberta Government Library in Edmonton as well as through a library catalogue online.

The public usually has 30 days from the time of notice publication to submit any comments, but longer timelines may be specified within the notice. If comments are not submitted within the timeframe provided, the Director may not be able to consider them. As well, the comments must be submitted to the appropriate person. The publication [here](http://aep.alberta.ca/land/land-industrial/programs-and-services/environmental-assessment/documents/ProvidingCommentsTermsReference-2010A.pdf) lists the address in which to submit comments.

**Appendix C**

**Detailed Consultation Frameworks**

1. Government of Alberta’s Proponent Guide to First Nations and Métis Settlement Consultation Procedures

(Alberta, The Government of Alberta’s Proponent Guide to First Nations and Métis Settlement Consultation Procedures (Alberta, The Government of Alberta, 2016) online: [<open.alberta.ca/dataset/40499ce0-dd05-4e7a-b7f5-42a02e71b8ec/resource/c0adf205-ac7d-4901-b825-6f0dfaad6d9d/download/2016-proponent-guide-to-first-nations-and-metis-settlements-consultation-procedures-2016-06-06.pdf,](https://www.aclrc.com/and%20M%C3%A9tis%20Settlement) [Alberta Proponent Guide]

The Alberta Proponent Guide provides detailed information to proponents engaged in consultation, including relevant timelines. Under the Alberta Proponent Guide, four different levels of consultation:

Level 1: no consultation required

Level 2A: streamlined consultation

a. Notified Indigenous groups have up to 15 working days to respond to notification
b. If there is no response within 5 days of initial notification, the proponent will follow up with the Indigenous group

c. If there is no response within 10 days, the proponent will follow up a second time
d. Once the 15-day notification has expired and there has been no response, the proponent will provide the Indigenous group with the consultation record and may ask the Indigenous Consultation Office to review it once the Indigenous group has had 5 days to review the record

Level 2B: standard consultation – notified Indigenous groups have up to 15 working days to respond to notification

a. Notified Indigenous groups have up to 15 working days to respond to notification
b. If there is no response within 5 days of initial notification, the proponent will follow up with the Indigenous group

c. If there is no response within 10 days, the proponent will follow up a second time
d. Once the 15-day notification has expired and there has been no response, the proponent will provide the Indigenous group with the consultation record and may ask the Indigenous Consultation Office to review it once the Indigenous group has had 5 days to review the record

Level 3: extensive consultation

a. Notified Indigenous groups have up to 20 working days to respond to notification
b. If there is no response within 10 days, the proponent will follow up with the Indigenous group
c. If there is no response within 15 days, the proponent will follow up a second time
d. If the 20-day notification period has expired without response, the proponent will provide the Indigenous group with the consultation record, and may ask the Indigenous Consultation Office to review it once the Indigenous group has had 10 days to review the record.

These timelines can be extended under the appropriate circumstances.



2.      Joint Operating Procedures for First Nations Consultation on Energy Resource Activities.

The Indigenous Consultation Office [ACO] and the Alberta Energy Regulator [AER] often deal with one another, and as such, they have agreed to a set of procedures contained in the Joint Operating Procedures for First Nations Consultation on Energy Resource Activities. (Alberta, Alberta Energy Regulator and the Government of Alberta, Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (Alberta, Alberta Energy Regulator, 2015) online: <https://www.aer.ca/documents/actregs/JointOperatingProcedures.pdf> [Joint Operating Procedures].

Under the Joint Operating Procedures, a potential project falls into one of 4 processes, and depending on the application type, there is a standard requirement of consultation that must be met. The four levels of consultation (Level 1, Level 2A, Level 2B, and Level 3) correspond to those contained in the Alberta Proponent Guide, discussed above.

**Appendix D**

**Oversight Mechanisms**

Environmental Assessment Team – Alberta Environment and Parks

The Environmental Assessment Team with Alberta Environment and Parks has an extensive FAQ page, that can be accessed [here](https://open.alberta.ca/dataset/e3cecb9a-a323-4761-9e98-e4be8f1dfe11/resource/53be76bc-a0e7-4baf-b5f3-7bc49312ea4b/download/4897712-2010-environmental-assessment-program-frequently-asked-questions-faq-updated-2010-02.pdf), and they can be contacted via email: environmental.assessment@gov.ab.ca

Alberta Energy Regulator

www.aer.ca/protecting-what-matters/protecting-the-environment/environmental-assessments

The Alberta Energy Regulator is responsible for making decisions on application for any energy related development or activities, and for monitoring compliance of these decisions. Specifically for environmental assessment in Alberta, they are responsible for any kind of energy resource activity, and ensuring that the environmental assessment process follows the appropriate procedures, which includes consultation with Indigenous peoples. They are not responsible for determining the adequacy of Crown consultation (this is done by the Indigenous Consultation Office).

Indigenous Consultation Office

[http://Indigenous.alberta.ca/573.cfm](http://indigenous.alberta.ca/573.cfm)

The Indigenous Consultation Office manages the consultation processes in Alberta. It exists under the Minister of Indigenous Relations. They have three primary functions: to provide pre-consultation assessment advice or direction, providing actual advice or direction during the consultation process, and evaluating consultation records and providing an assessment of consultation adequacy.

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*National Energy Board Act,* RSC 1985, c N-7.

*Nuclear Safety and Control Act,* SC 1997, c 9.

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*Water Act,* RSA 2000, c W-3.

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1. * This Report recommends that Indigenous knowledge should be considered “in parallel to western knowledge or science” (EA Expert Report at 33). In order to maintain the integrity of this information, Indigenous communities should have the opportunity and resources to collect their own knowledge, engage in community lead review, and present their information in accordance with their own value systems (Coates and Favel). This also would assist in protecting the confidentiality of this information in accordance with Article 31 of the *UNDRIP.* [↑](#footnote-ref-1)