

Principles to Guide the Assessment of Impacts to Indigenous Inherent and Treaty Rights

Indigenous peoples¹ have constitutional rights reflected in section 35 of the *Constitution Act, 1982*, which recognized and affirmed Aboriginal (inherent) and treaty rights. Historical and ongoing colonization of the environment, natural resources, and Indigenous lands have negatively impacted the rights of Indigenous peoples. The Impact Assessment Agency of Canada (the Agency) requires proponents of project as legislated in the *Impact Assessment Act, 2019* (IAA) to assess potential impacts on the rights of Indigenous peoples as part of a federal impact assessment². While the Agency is responsible for managing the impact assessment process, proponents have an important role in helping the Agency understand and assess potential impacts to the exercise of inherent Aboriginal and treaty rights of proposed projects. The Agency has emphasized the important role Indigenous peoples play in the assessment of their rights and that the assessment process must acknowledge and respect Indigenous laws, customs, and governance processes. The assessment process must also be informed by, and aligned with, the Truth and Reconciliation Commission (TRC) of Canada: Calls to Action and the United Nations Declaration of Rights for Indigenous Peoples (UNDRIP).

The Agency established the Indigenous Advisory Committee (Committee) in August 2020 to provide the Agency with expert advice for the development of key policy and guidance on the new impact assessment process under the IAA. The Committee's membership includes First Nations, Inuit, and Métis representatives to help ensure that the Committee provides a broad and inclusive perspective that is reflective of the unique rights, interests, priorities, and circumstances of Indigenous peoples in Canada. Periodically, the Committee will create subcommittees who are tasked with developing policy guidance and recommendations for the Agency on a variety of topics. In 2021 through to 2022, the IAC Impact to Rights Subcommittee was tasked to develop policy guidance for practitioners and proponents in the assessment of impacts to Indigenous rights. As a group, the Subcommittee with support from, Dillon Consulting Limited and SOAR Professional Services, has developed a set of guiding principles for practitioners and proponents to follow as part of the assessment of impacts to Indigenous rights under the federal impact assessment process.

It is important to create an ethical space necessary for an assessment of impacts to Indigenous rights that is aligned with Indigenous perspectives and best practices, and informed by free,

¹ First Nations, Inuit and Métis peoples.

² The *Impact Assessment Act* requires that the impact assessment of a designated project must take into account a number of factors, including "*the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982.*" (Section 22(1)(c)). Throughout this document, 'rights of Indigenous peoples' and 'rights' refer to the rights of the Indigenous peoples of Canada, as recognized and affirmed in section 35 of the *Constitution Act, 1982*, and consistent with the *Impact Assessment Act*.

prior, and informed consent (FPIC). Seven overarching principles are proposed, each based around fundamental concepts or themes that are focused on respectful and meaningful approaches to the assessment of impacts to Indigenous rights. The principles include the understanding of rights, protection of rights, understanding Indigenous governance, role of Indigenous knowledge, engagement and consultation, impact assessment process, and reconciliation.

The principles are focused on providing guidance to proponents during the impact assessment process, to encourage reciprocal relationships and respectful assessment of the impacts to Indigenous rights. A key tenet of this approach for proponents is to engage and involve Indigenous rights holders as early in the assessment process to foster a respectful and inclusive approach to the assessment of impacts to Indigenous rights. This document provides important information on guiding principles that must be interpreted and applied in conjunction with other guidance from the Agency. For more operational guidance, proponents should consult the *Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples*.³

UNDERSTANDING OF RIGHTS: The assessment of potential impacts to rights must be inclusive of all Indigenous rights and interests.

Assessment of rights must always be grounded in a holistic understanding of the Indigenous rights and interests that could be impacted. Indigenous rights are inherent and derived from sacred responsibilities and the relationships Indigenous people have with the land, the water, plants and animals, and connections to intangible aspects, like spirituality and the spirit world. To apply a successful rights-based approach, understanding of rights must be based on the rights as asserted by the rights-bearing community. Indigenous rights are intrinsically linked to the ability of Indigenous people to practice a traditional and contemporary way of life on their land. Existing impact to Indigenous rights and the exercise of those rights are linked to incredibly harmful government policies, such as residential schools, day schools, erasure of culture and gender discrimination, to mention a few, therefore, it is critical to understand that impacts to Indigenous rights have existed a long time prior to any proposed projects. Therefore, it is imperative that proponents understand the nature of the impact to Indigenous rights in a cumulative nature by understanding historical and contemporary impacts to rights in a wider context, not just limited to the scope of projects.

Proponents must demonstrate an understanding and respect of Indigenous rights to the fullest extent possible. Proponents must take responsibility for developing an active understanding of the diversity of Indigenous rights their project may impact. Do not rely solely on Indigenous people to be the sole teachers or educators regarding their rights. Proponents should actively conduct their own research and learning. They should seek opportunities to collaborate with Indigenous rights holders in efforts to develop a better awareness and understanding of their rights. Proponents must strive to understand all Indigenous rights and interests recognizing that

³ See generally: *Practitioner's Guide: Assessment of Potential Impacts on the Rights of Indigenous People*

Indigenous rights are diverse and specific across Indigenous rights holders.⁴

Project proponents must carefully consider the scope of rights for Indigenous rights holders that could be impacted by the project. This scope of rights must also be grounded in a broad and diverse interpretation of what constitutes Indigenous rights. It is important to consider that Indigenous rights are recognized and affirmed through legislation, case law, and treaty, not derived from or defined by them.⁵ Legislation and case law may only offer a minimum standard for the interpretation of rights and may not be inclusive of other Indigenous groups.

Indigenous rights can include:

- Inherent and treaty rights;
- Rights associated with land claims;
- Rights affirmed through case law;
- Rights understood as sacred responsibilities defined through Indigenous laws or Indigenous customs or traditions; and,
- Rights as informed through the Recognition of Indigenous Rights and Self-Determination discussion tables.⁶

Proponents must understand that some Indigenous rights holders have documented their asserted rights and are more prepared to enter into conversations⁷, whereas some Indigenous rights holders may need more support to assist in the preparation for discussions on their rights and potential impacts. While the Agency offers support and resources for Indigenous rights holders, proponents must make efforts to understand the specific context of Indigenous rights holders groups and come prepared to support Indigenous groups in this process.

Proponents must recognize that impacts to Indigenous rights can have a variety of lasting effects and impact on future generations if not avoided or mitigated appropriately. The scope of impacts to rights must not be viewed too narrowly or focused on project specific impacts. Impacts to rights can be temporal, interconnected and cumulative in nature. These impacts can affect the physical, mental, spiritual, and social health and wellbeing of Indigenous people and can impact the expression of values, culture, and language of Indigenous groups.

⁴ The general term 'Indigenous rights holders' is used to refer to a collective of rights-holding First Nations, Inuit or Métis people. The Government of Canada's Principles Respecting the Government of Canada's Relationship with Indigenous D (see note 1) describes a rights-holding Indigenous group: "As set out by the courts, an Indigenous nation or rights-holding group is a group of Indigenous people sharing critical features such as language, customs, traditions, and historical experience at key moments in time like first contact, assertion of Crown sovereignty, or effective control."

⁵ Burrows, John, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" *The Canadian Historical Review* 98, no. 1 (March 2017): 114-135.

⁶ See generally: <https://www.rcaanc-cirnac.gc.ca/eng/1511969222951/1529103469169>

⁷ See example: <https://www.musqueam.bc.ca/departments/title-and-rights/>

PROTECTION OF RIGHTS: The assessment of potential impacts to rights must be focused on the protection of Indigenous rights and interests.

The protection of Indigenous rights is the fundamental objective of the assessment of impacts to rights process and should be focused in such a way as to minimize or avoid potential impacts whenever possible. The Agency works to advance the Government of Canada's commitment to UNDRIP, which was foundational in the development of the IAA. The IAA and its supporting policy framework include elements consistent with UNDRIP, including early and regular engagement and participation, collaboration and cooperation, respect for rights and jurisdiction, mandatory application of Indigenous knowledge, and building Crown-Indigenous relations and capacity. The Agency works to continually develop and strengthen processes and procedures and enabling new ways to respect UNDRIP,⁸ however, the IAC acknowledges that UNDRIP is not the final step in relationship building and reconciliation, and that the relationship between the Government of Canada and Indigenous peoples will continue to develop and evolve.

The Government of Canada recognizes that reconciliation is the fundamental purpose of section 35 of the *Constitution Act*, and acknowledges that it must uphold the honour of the Crown in all its dealings with Indigenous people.⁹ The honour of the Crown ensures the Crown has the duty to consult and where appropriate accommodate when the Crown considers conduct that might adversely impact potential or established inherent Aboriginal and or treaty rights.

While the duty to consult rests with the Crown, proponents also have an important role in helping to protect Indigenous rights during the assessment process. A central tenet of the assessment of rights process should be that proponents must consider and aim to protect Indigenous rights now and for future generations. Proponents must frame their approach through the protection of rights and aim that any impacts be as minimal as possible.

The protection of Indigenous rights is a continuous and active process that can also advance reconciliation. Proponents can achieve this through building respectful and meaningful relationships with potentially affected Indigenous rights holders. Providing Indigenous rights holders with early and on-going opportunities to provide input and feedback and incorporating this into project planning is critically important.

Participation in the assessment process by Indigenous rights holders must not be assumed to be approval or support for a project or development. Opportunities for rights holders to participate must be viewed as a means through which they can build capacity and ultimately assert their inherent and treaty rights in relation to projects that may impact their rights.

⁸ For more information, see: <https://www.canada.ca/en/impact-assessment-agency/programs/participation-indigenous-peoples/implementing-united-nations-declaration-rights-indigenous-peoples.html>

⁹ For more information, see: Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples.

UNDERSTANDING GOVERNANCE: The assessment of potential impacts to rights must include a recognition of specific Indigenous governance structures

Assessment of the impacts to governance must consider whether the impacts of the project will affect the Indigenous rights holders' ability and systems for self-governance, including governance of future generations. Indigenous governance is generally related to the concepts of Indigenous self-determination, nationhood, jurisdiction, stewardship, and culture. Indigenous governance can also include the management and co-management¹⁰ of traditional lands, territories, and resources.

It is the responsibility of proponents to recognize that Indigenous rights holders have the right to determine how they govern and manage their affairs in accordance with their specific perspectives, customs, and traditions. Proponents must make efforts to understand specific governance protocols, based on laws, customs and structures of the Indigenous groups, and differences that may exist between groups and let these inform the assessment of rights.

Governance and decision-making authority can be expressed through an Indigenous group's specific laws, norms, power, language and how members are held accountable for actions. Recognize and respect that there are important distinctions between and within Indigenous groups, and territories, relating to governance and decision-making structures. For example, one Indigenous group may govern according to hereditary lineages or by family groups, whereas other Indigenous may govern through an elected Chief and Council or other elected body. There may also be Indigenous governance systems that can include both or other variations of governance structures.

Assessment of rights must be focused in a way that promotes and supports unity within and among Indigenous rights holders and respective governance structures¹¹.

Governance can include consideration of both acceptability of an impact and the manageability or resilience to an impact, such as the perceived threshold of the extent an Indigenous group can tolerate an impact.

¹⁰ See generally: Land Claims-based Co-Management Boards, for more information see: <https://www.rcaanc-cirnac.gc.ca/eng/1466431262580/1547478287247>

¹¹ For more information and guiding questions for understanding governance, see pages 30-32 in the Practitioner's Guide: Assessment of Potential Impacts on the Rights of Indigenous People

ROLE OF INDIGENOUS KNOWLEDGE: The assessment of potential impacts to rights must be guided by Indigenous Knowledge systems and Indigenous ways of knowing.

Indigenous Knowledge (IK)¹² enhances the understanding of potential impacts associated with projects and improves the rigor of regulatory decision-making. In efforts to build capacity, the Agency and proponents must provide generous and consistent funding to Indigenous rights holders in order to support, build and sustain IK capacity for the collection, management, and storage of this information, as it relates to a project or development.¹³

IK must be recognized as collectively held and verified. IK must be treated with respect and protected in accordance with the knowledge holders protocols. Indigenous rights holders and knowledge holders must have opportunities to be involved in all stages of the process. When IK is to be defined, collected and interpreted, Indigenous rights holders must have the opportunity to conduct research themselves, and/or work with researchers of their choosing. Indigenous rights holders must be the party responsible for identifying who provides and verifies IK, and how permissions are obtained.

IK, when provided confidentiality, must be protected from unauthorized disclosure and inappropriate use, with explicit and transparent understanding of how the IK will be used, interpreted, and reflected in the decision-making process. The Agency has developed guidance to promote good governance practices with respect to the management of confidential IK received.¹⁴

Understand that IK and ways of knowing are not the same as Indigenous rights and interests. IK provides important baseline information to help inform project planning and assessment of potential impacts of a project on land, water, air, socio-economic, culture and language, and resource use and traditions. Indigenous rights and interests on the other hand are a critical value component of the assessment and can be informed by specific studies, community engagement or interviews, or other information sources.

IK must maintain equal footing (at a minimum) with western science and impact assessments must include collaborative approaches to incorporating Indigenous Knowledge Systems to guide the assessment process.

¹² For more information on defining Indigenous Knowledge see: Section 22 - Factors to be considered descriptions: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/section-22-factors-considered-descriptions.html>

¹³ For more information see information provided by IAC Sub-Committee on Indigenous Knowledge: <https://www.canada.ca/en/impact-assessment-agency/advisory/advisory-groups/indigenous-advisory-committee/principles-development-indigenous-knowledge-policy-framework.html>

¹⁴ For more information, see: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/protecting-confidential-indigenous-knowledge-under-the-impact-assessment-act.html>

IK must be holistically woven throughout the assessment process. IK supports a more holistic understanding of Indigenous world views, cultures, traditions, environments, and social, health and economic conditions of Indigenous peoples.

Assessments must also consider any potential impact on traditional, current, and future exercise of rights and potential impacts to Indigenous culture and language, spirituality, and the relationships to elements of the world. The assessment must adopt a comprehensive definition of IK that recognizes this knowledge system as dynamic and continuing to evolve over time. Defining IK must be conducted in the context of project reviews and regulatory processes, but must always be driven by Indigenous rights holders.

ENGAGEMENT AND CONSULTATION: The assessment of potential impacts to rights must be collaborative and create opportunities to foster relationships with Indigenous rights holders.

Achieving effective and meaningful participation of Indigenous rights holders requires a flexible and collaborative approach to create opportunities that foster meaningful relationships¹⁵. Flexible participation approaches may identify opportunities for innovative practices that reflect the needs of Indigenous rights holders and respect Indigenous cultures, traditions, governance, and ways of life, while remaining transparent and fair throughout the assessment process.

Language plays a critical role in all of these guiding principles and the assessment process, but especially during consultation and engagement process. There are over 70 distinct Indigenous languages being spoken across Canada.¹⁶ There has been a decrease in the transmission of languages due to impacts from colonization and past government policies, in recent years there have been significant efforts to revitalize and sustain Indigenous languages across Canada. Language is both informed by and informs relationships, interactions, values and knowledge systems, essential to Indigenous identities and culture. Supporting language revitalization helps to advance reconciliation, as such, proponents should make every effort to understand Indigenous rights holder values and ties to their languages and provide support including, support oral testimony and reporting, translation of key materials and document, translation during meetings and discussions.

The role of Indigenous rights holders will vary for each assessment process, depending on factors that include:

- Indigenous peoples self-determination and their interest in participating;
- The nature of the proposed project;
- The type and seriousness of potential project impacts or cumulative impacts;
- The nature of the Indigenous rights holders interest in the rights or resources that may

¹⁵ For more information, see: Policy Context: Indigenous Participation in Impact Assessment & Guidance: Collaboration with Indigenous Peoples in Impact Assessments

¹⁶ <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016022/98-200-x2016022-eng.cfm>

- be potentially impacted; and,
- If within the jurisdiction of the IAA.

Proponents shall actively engage with Indigenous rights holders as early as possible in the planning phase of the process to:

- Provide opportunities for Indigenous rights holders to learn about the assessment process;
- Allow adequate time for Indigenous rights holders to respond to requests;
- Allow for maximum identification of potential impacts;
- Encourage collaborative participation;
- Identify needs around collaboration agreements;
- Identify IK or studies that may inform the assessment of rights and interests;
- Explore or develop potential benefits associated with the project; and,
- Work collaboratively with rights holders to identify avoidance or mitigation and accommodation measures.

ASSESSMENT PROCESS: The assessment of potential impacts to rights must foster reciprocal understanding of the impacts and options to avoid or mitigate them.

The assessment of Indigenous rights must be consent-based, ideally with free, prior and informed consent (FPIC) and conducted with respect and in good faith to foster reciprocal understanding of the potential impacts to rights and identify avoidance or mitigation and accommodation strategies¹⁷. As the owners of the project, proponents' participation in the assessment of impacts to rights is critically important for developing options for avoidance or mitigation and accommodation of potential impacts to rights. Proponents must provide clear information to Indigenous rights holders at the outset and work collaboratively with Indigenous rights holders to identify impacts and potential avoidance, mitigation and accommodation measures. Proponents must also allow for Indigenous rights holders to complete their own 'self-assessment' of impacts or work collaboratively with Indigenous rights holders, when requested or directed, as part of the assessment process.

Thresholds and metrics associated with the assessment of rights must be defined, qualitatively or quantitatively, by Indigenous rights holders, to reflect the Indigenous peoples and Indigenous rights holders' perspectives and way of life. Especially when potential impacts, thresholds and metrics may be less tangible, for example, the ability transfer of knowledge and cultural

¹⁷ Accommodation, mitigation and complementary measures share a common aim: to avoid, minimize, or compensate for potential adverse impacts that may result from a project. The distinction between the different types of measures is the scope and legal basis of each. For more information on the distinction see: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html>

practices. Proponents must also make efforts to discuss temporal scope and boundaries with Indigenous rights holders during assessment to help ensure the baseline for thresholds and metrics are considered by all parties.

Cumulative impacts to rights must be considered in the context of the larger historical and current impacts to Indigenous rights. This must take into consideration other projects within the territory or region that may be planned or implemented.

The assessment process must create space and capacity for Indigenous rights holders to meaningfully participate or for them to lead their own assessment of the impacts to their rights.

The assessment must consider all potential impacts pre-project, during construction or development, and post-project and facilitate discussion on appropriate avoidance, mitigation, accommodation, or reclamation measures.

RECONCILIATION: The assessment of potential impacts to rights must advance and support reconciliation at all stages of the process.

The Impact Assessment Agency of Canada seeks to work with Indigenous peoples in a way that advances reconciliation. The Government of Canada recognizes that reconciliation is the fundamental purpose of section 35 of the *Constitution Act*, and acknowledges that it must uphold the honour of the Crown in all its dealings with Indigenous people¹⁸. As such, the assessment of impacts to rights must advance and support reconciliation at all stages of the process. The Agency and IAC acknowledge the significance of the Truth and Reconciliation Commission (TRC) of Canada: Calls to Action and actively work to delivering on the TRC calls in good faith. Proponents are expected to also take action to acknowledge the calls and keep good faith and intention throughout the assessment process. The following Calls to Action¹⁹ focus on reconciliation and are of particular importance to the assessment process:

Canadian Government and the United Nations Declaration on the Rights of Indigenous Peoples

43. We call upon federal, provincial, territorial and municipal governments to fully adopt the implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.

¹⁸ For more information, see: Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples.

¹⁹ <https://nctr.ca/records/reports/#trc-reports>

44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.

Business and Reconciliation

92. We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

- i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
- ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
- iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Fostering reconciliation through the assessment of rights requires that proponents work closely and thoroughly with Indigenous rights holders to properly identify potential impacts to rights; the process is about engaging in meaningful discussions to interpret potential impacts and explore opportunities for reconciliation and relationship building. In collaboration with Indigenous rights holders, discuss pre-defined adverse impact thresholds to rights that could be considered significant. Where impacts cannot be mitigated or avoided, co-develop appropriate and meaningful accommodation measures and/or benefit agreements.

The assessment of rights must be an opportunity to foster education and awareness of Indigenous rights, support Indigenous rights holders by building and contributing to decolonization efforts. The assessment of potential impacts to rights should be a “living process” and revisited at various stages to adequately capture the discovery of potential impacts to rights throughout the assessment process.

Proponents must take additional steps to better understand how their project and the assessments of right associated with an impact assessment can support reconciliation. A key component of this is to seek out additional information and explore how your project may support reconciliation beyond, or in support of, traditional standards of avoidance, mitigation, accommodation, or reclamation measures. Some of these reconciliation actions are detailed in the following documents, the:

- Report of the Truth and Reconciliation Commission of Canada (2015)²⁰;
- Truth and Reconciliation Commission: Calls to Action (2015)²¹;
- Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls²² ;
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and
- Free Prior and Informed Consent (FPIC).

²⁰ <https://nctr.ca/records/reports/#trc-reports>

²¹ <https://nctr.ca/records/reports/#trc-reports>

²² <https://www.mmiwg-ffada.ca/final-report/>