INDIGENOUS-LED ASSESSMENTS AND INDIGENOUS KNOWLEDGE IN IMPACT ASSESSMENTS

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OVERVIEW

Indigenous-led Impact Assessment (ILIA) refers to processes where Indigenous nations take control over resource governance decisions, specifically in the context of assessing the potential environmental, social, and cultural impacts of projects.[1]

The key aspect of Indigenous-led IA is that, when done well, it can allow Indigenous communities to assert authority and leadership in determining how projects that affect their lands, cultures, and ways of life are assessed and managed.

Research on ILIA applications highlights challenges, notably the lack of a true consent mechanism and the limitations imposed by settler legal systems.[2] These constraints stem from the Crown's dominant environmental and impact assessment processes, which do not fully recognize Indigenous nations' authority to consent or withhold consent for projects on their lands. The level of power Indigenous communities have in conducting and controlling impact assessments is highly dependant on the status of the land (e.g., unceded territories, modern treaty lands, or private land), as dictated by settler law.[3] Additionally, Indigenous-led

[1] Dayna Nadine Scott, Jennifer Sankey & Laura Tanguay (eds.) "Operationalizing Indigenous-led Impact Assessment," (2023) at 9-10, online (pdf): *Impact Assessment Agency of Canada* < https://static1.squarespace.com/static/62bce94a21d7a40070368060/t/6487c91bedd791755fffc770/1686620445525/OperationalizingIndigenousImpactAssessment_FullReport_Final.pdf> [OILIA].
[2] *Ibid* at 114.
[3] *Ibid*.

assessments are often secondary to Crown-led processes, with assessments generally being triggered by proponents' plans rather than Indigenous priorities.

Despite these legal constraints, Indigenous-led assessments have the potential to energize communities, revitalize Indigenous laws, and strengthen connections to territories and legal practices.[4] Engaging in these processes can empower Indigenous nations, even if they lack the authority to enforce their decisions under settler law. Ultimately, the literature calls for a rethinking of the relationship between Crown and Indigenous governance and underscores the need for more robust, self-determined Indigenous-led impact assessments that are not merely advisory, but have the power to enforce Indigenous authority.

INDIGENOUS-LED IMPACT ASSESSMENTS

Indigenous peoples have long recognized the inability of settler laws to "protect their constitutionally recognized Aboriginal and Treaty rights, and to meaningfully engage with Indigenous laws, values, and perspectives regarding the socio-ecological risks posed by resource development projects."[5]

While increasingly, the literature calls for the meaningful recognition of the laws, knowledges and rights of Indigenous peoples in impact assessment, it is crucial to acknowledge that "Indigenous laws and Western laws must be respected as equal and distinct."[6] Explicitly including the consideration of Indigenous knowledge and the impacts on Indigenous peoples in impact assessment legislation is a promising step. However, there is still a long way to go to

[4] *Ibid.*
[5] OILIA, *supra* note 1 at 8.
[6] Paynter, F., Pastora Sala, J., Fitzpatrick, P., & Broomfield, S. (2022). *Unfinished conversations: Honouring Indigenous relationships and knowledges in IA.* Paper presented at the International Association of Impact Assessment, Vancouver, BC.

implement shared decision-making and respecting Indigenous laws as equal and distinct from Canadian legislation.

In response to frustration with settler impact assessment laws, Indigenous nations have been creating and using their own methods and processes to conduct their own assessments of major projects proposed for their territories. Indigenous nations have developed "impact assessment processes that reflect their own priorities and laws and are using these processes to assert their jurisdiction over their territories and to challenge the presumed unilateral authority of settler laws."[7]

While relatively new and in a state of flux, Indigenous-led impact assessments are starting to move in that direction. Some aspects of a definition of Indigenous-led impact assessments from the literature include:

1. Completed prior to any approvals, agreements or consent being provided for a proposed project (that is, communities should be able to apply a threshold determination as to whether a project is in line with identified priorities for the territory, or would violate established no-go zones, before they even decide to conduct an assessment);
2. Undertaken with some degree of control by affected Indigenous parties – on their own terms and subject to their approval;
3. Structured according to the relevant Indigenous nations' determination of the appropriate scope; methods for data collection; values to be protected; principles for assessment, follow-up and monitoring; and threshold for decision-making about a project (according to their own protocols);
4. Governed by a process determined by local realities, capacities, challenges, priorities, practices, knowledge, and relations; and

[7] OILIA, *supra* note 1 at 6-7.

5. Subject to the applicable Indigenous legal order and oriented towards maintaining the life-affirming practices that flow from reciprocal relations with lands and waters.[8]

INDIGENOUS-LED IMPACT ASSESSMENTS: TOOLS AND CASE STUDIES

The literature and case studies highlight five main tools that Indigenous Nations have used to design and implement their own assessments, based on their unique cultural, historical, and environmental contexts.[9] These tools include:

1. **Framework Agreements**: Contracts that set the terms for power and responsibility sharing between Indigenous Nations, the government, and industry proponents. An example is the Squamish Nation's use of a framework agreement in assessing the Woodfibre LNG project, which allowed them to independently assess the project's impact on their rights and territory.
2. **Customized Review Panels**: Community-based panels that ensure Indigenous values are incorporated into project assessments. The Stk'emlu'psemc te Secwepemc Nation (SSN) used such a panel to evaluate the KGHM Ajax Mine project, ensuring their governance, knowledge, and cultural values were respected. This panel helped the SSN community make a well-informed decision, ultimately rejecting the mine proposal due to its negative impacts on their cultural sites.
3. **Land Use and Consultation Policies**: These policies guide how land use decisions are made, incorporating community consultations that align with Indigenous values and governance.
4. **Impact and Benefit Agreements (IBAs)**: These agreements outline the benefits and compensation for Indigenous Nations affected by a development project. They can be tailored to ensure fair and equitable treatment of Indigenous communities in relation to projects affecting their lands and resources.

[8] OILIA, *supra* note 1 at 9.

[9] J. Nishima-Miller et al., "Tools for Indigenous-led impact assessment: insights from five case studies. Impact Assessment and Project Appraisal," 42(1), 70-87, online (pdf): <doi:10.1080/14615517.2024.2306757> [Nishima-Miller et al.,]

5. **Land Use Planning**: Tools and strategies that help Indigenous Nations manage their lands in a way that reflects their needs, values, and long-term sustainability goals.

These tools can enable Indigenous Nations to take control of the assessment process and make decisions that reflect their cultural values and governance structures. While based in Canada, these tools have broader relevance for integrating Indigenous perspectives into impact assessments globally.

The literature reveals there is no single definition of Indigenous knowledge. Indigenous knowledge is a diverse knowledge that is spread through different people in many layers; it is a part of the community or individual and it can only be identified in a personal context. Indigenous Knowledge generally reflects the land-based or place-based knowledge that Indigenous peoples have. This knowledge is connected to Indigenous peoples' connection with the land. Additionally, this information is based in generational knowledge and is flexible and adaptable in the context of environmental and social change.[10] Put aptly:

> "IK is generally thought of as a body of place-based knowledges accumulated and transmitted across generations within specific cultural contexts."[11]

JUDICIAL CONSIDERATION OF INDIGENOUS KNOWLEDGE IN IMPACT ASSESSMENTS

The inclusion of Indigenous knowledge in decision-making became a requirement in the Canadian common law following cases such as *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 and *Tsleil-Waututh Nation v Canada,* 2018 FCA 153.

[10] Jessen et al., "Contributions of Indigenous Knowledge to ecological and evolutionary understanding" (2021) *Front Ecol Environ* 1 at 1.
[11] *Ibid* at 1.

Although the inclusion of Indigenous knowledge in impact assessments began with the 'Berger Inquiry', it wasn't until the passage of the federal *Impact Assessment Act* that this inclusion became mandatory in impact assessments at the federal level.[12]

Authentic inclusion of Indigenous knowledge in the impact assessment process must involve "active engagement in the process of determining how this information will be documented, interpreted, shared and applied."[13]

Caselaw is generally limited on affording due weight to contemporary ecological knowledge provided by First Nations to show changes to land. Some cases include commentary on the nature of evidence, and what type of evidence is considered when determining the impact of resource development on land and land-based activities:

- *Sierra Club Canada Foundation v Canada (Environment and Climate Change)*: This case demonstrates an attempt to recognize Indigenous knowledge in impact assessments prior to the IAA.[14]
- *Canada (Environment and Climate Change) v Ermineskin Cree Nation*: This case demonstrates how Indigenous knowledge factors into impact assessments under the IAA.[15]
- *Ecology Action Centre v Canada (Environment and Climate Change)*: This case demonstrates how Indigenous knowledge factors into regional assessments, which also operate under the federal IAA.[16]

In *Yahey*, the court was tasked with determining the extent of a rights infringement from cumulative development on Blueberry River's lands. The court made important

[12] Martin Olszynski & Justina Ray, "Science and Indigenous Knowledge as the Evidentiary Basis for Impact Assessment" in Meinhard Doelle and John Sinclair, eds, *The Next Generation of Impact Assessment Act* (2021), ch 20 at 473.
[13] *Ibid* at 469-470.
[14] *Sierra Club Canada Foundation v Canada (Environment and Climate Change)*, 2023 FC 849.
[15] *Canada (Environment and Climate Change) v Ermineskin Cree Nation*, 2022 FCA 123.
[16] *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367.

pronouncements detailing how First Nations' perspectives should be weighted and treated in situations of rights infringements:

> [1096] These statements about evidence, perspective, and weight relate primarily to the determination of the right, but are also relevant to the court's determination of infringement. **Giving appropriate weight to the evidence given by Blueberry members about the impacts to the exercise of their rights is part of being sensitive to Blueberry's perspective on the "meaning of the rights at stake**."

In *Reference re Impact Assessment Act*, the Supreme Court of Canada considered a constitutional challenge to the federal *Impact Assessment Act* ("IAA") enacted in 2019. The majority decision, which found that IAA to be in part constitutional, acknowledged various ways that the IAA pays special attention to Indigenous Peoples and Indigenous knowledge.

The preamble of the IAA proclaims Canada's commitments to ensuring respect for the rights of Indigenous Peoples.[17] Ensuring respect for the rights of Indigenous Peoples is one stated purpose of the IAA. Other stated purposes with respect to Indigenous Peoples are "to promote cooperation and a coordinated action between . . . the federal government and Indigenous governing bodies"; "to promote communication and cooperation with Indigenous peoples of Canada;" and to "take into account . . . Indigenous knowledge."[18]

Indigenous Peoples and Indigenous knowledge are also recognized in the three stages of the designated projects scheme (i.e., planning phase; impact assessment phase; the decision-making phase) under the IAA. In particular, when assessing a designated project, the assessment report must account for specific factors with respect to Indigenous Peoples. These factors are listed in section 22 of the IAA and include: the impact that the project may have on any Indigenous group; any adverse impacts that the project may have on the rights of

[17] *Reference re Impact Assessment Act,* 2023 SCC 23 at para 79 (*Reference Decision*); *Impact Assessment Act,* SC 2019, c 28, s 1, Preamble (IAA).
[18] IAA, *supra* note 17 at s 6.

Indigenous Peoples; Indigenous knowledge that was provided; considerations related to Indigenous cultures; any assessment of the effects of the project conducted by/on behalf of an Indigenous governing body; and any study/plan conducted/prepared by an Indigenous governing body in respect of a region related to the project.[19]

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") is an important source of rights for Indigenous peoples around the world. It was incorporated into Canada's legal framework in 2021 and the Supreme Court of Canada has found that it may be used to interpret Canada's laws and obligations. What remains to be seen in future cases is how this interpretative role will be used and whether courts will one day find that UNDRIP can create new laws or statutory obligations.

UNDRIP was adopted by the UN General Assembly on September 13, 2007. As it relates specifically to impact assessment, UNDRIP contains the following relevant clauses:

- reference to the rights of Indigenous peoples "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;"[20] and
- UNDRIP also states that "States shall consult and cooperate in good faith 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

[19] *Ibid* at s 22.
[20] UNDRIP, Article 25.

> their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[21]

In recent cases, the Supreme Court of Canada has confirmed that UNDRIP has been incorporated into Canadian law and, as such, may be used to interpret Canadian law and legal obligations.[22]

The Federal Court has found that "UNDRIP does not create new law or statutory obligations; rather, it is an interpretive lens to be applied to determine if the Crown has fulfilled its obligations prescribed at law."[23] In particular, the Federal Court has confirmed that "this requires all decision makers, including administrative tribunals that have the authority to determine questions of law (…), to actively consider how the UNDRIP may impact the interpretation of Canadian laws, including the fulfillment of section 35 constitutional obligations."[24]

It may be the case that UNDRIP will require consideration of Indigenous laws and knowledge in projects impacting their rights, going forward. For example, the Federal Court has recently found that it was a mistake in law for a decision to "not address how the UNDRIP concept of FPIC (Free Prior and Informed Consent) requires an enhanced and more robust process to ensure that consultation processes were tailored to consider Kebaowek's Indigenous laws, knowledge, and practices, and that the process was directed towards finding mutual agreement."[25]

It is anticipated that future cases will shed light on the exact extent to which UNDRIP can be used as an interpretative role and whether courts will find that UNDRIP can create new laws or statutory obligations.

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[21] UNDRIP, Article 32.
[22] *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 at para 4.
[23] *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319 at para 76.
[24] *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319 at para 81.
[25] *Ibid,* at paras 133-134.