

Evolution: Consultation, Collaboration, Consent

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Introduction

The evolution of environmental assessment (EA) in British Columbia (BC), Canada has accelerated in recent years, in part prompted by successive court decisions¹ that have increasingly clarified and evolved the legal duty to consult Indigenous nations on government decisions (including EA decisions). In order for the BC Environmental Assessment Office (EAO) to ensure regulatory certainty and durable decisions, it became imperative that we change our approaches to involving Indigenous nations in EA. On November 26, 2018 the Province of BC passed a new EA act (Bill 51 – 2018: Environmental Assessment Act, S.B.C. 2018, c. 51²). The act embodies many tools and approaches that go beyond the legal duty to consult – in part, aimed at supporting reconciliation with Indigenous peoples. The act is further rooted in the Government’s commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

This paper discusses how the EAO has moved beyond the legal duty to consult as the standard practice, to developing a suite of collaborative approaches that invite greater and different forms of Indigenous participation in EAs.

To date, the EAO and Indigenous nations have undertaken a range of approaches including collaboration agreements between the EAO and Indigenous nations, collaboration between proponents and Indigenous nations, separate but linked provincial and Indigenous assessments and independent Indigenous assessment. These approaches focused on shared administration of parts of the EA process with Indigenous nations and more opportunities for incorporating Indigenous interests and knowledge into EAs.

The EAO’s range of collaboration experiences contributed to the development of the new act. Engaging Indigenous nations in inclusive processes that seek information, understanding, and deep engagement support informed, durable decisions and long-term relationships and ultimately, reconciliation.

Legal Context for Indigenous Consultation in BC

Before Europeans settled in North America, Indigenous peoples used and occupied the land, and as such they have a unique legal status in Canada. This is recognized through the inclusion of Section 35 of Canada’s *Constitution Act, 1982*³. A substantial body of common law, or legal principles developed through successive court rulings, has developed that identifies and defines aboriginal and treaty rights and provides guidance on how they are to be reconciled with the rest of Canadian society.

¹ See for example *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; and *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44.

² Available at: <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/progress-of-bills>

³ Section 35(1) of the *Constitution Act, 1982* states: “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”

Within BC, there are 203 Indigenous groups whose traditional territories cover the province. Approximately 20% of the land base is covered by either historic or modern-day treaties, where rights, obligations and in some cases engagement processes are set out by way of solemn treaty agreements with constitutional protection. The remaining 80% of the land base is subject to land claims in various forms. With few treaties in place in BC, court rulings continue to shape the relationship between non-treaty Indigenous nations and the Crown in very substantial ways.

Successive court rulings clarifying and evolving the legal duty to consult Indigenous nations prompted the province to change its approach to engaging Indigenous nations on land use decisions. The first step was the province's commitment to reconciliation, followed by seeking to find more inclusive ways to engage Indigenous nations on land use decisions.

Context for EAs in BC

EAs in BC are administered by the EAO, an independent office in the provincial government. The act sets out thresholds for categories of major projects that are automatically reviewable. EAs are inclusive processes, with the EAO seeking input from scientific professionals, Indigenous nations, the public, local governments, and federal and provincial agencies to provide the detailed, impartial review of the proponent's technical studies. The final EA decision is made by two elected officials supported by recommendations made by the EAO.

Approaches to engaging Indigenous nations and integrating Indigenous interests and knowledge into EAs

The EAO successfully adapted to meet the evolving legal duty to consult but recognized that was not sufficient to meet the Province's broader objectives regarding reconciliation. The table below describes the approaches the EAO and proponents have used to enhance Indigenous engagement in recent EAs. These approaches were adapted on different project EAs based on the specific context. The chosen approach was generally driven by the interests of the Indigenous nation.

The new approaches employed by the EAO to engage Indigenous nations in EAs added additional obligations and risks within already demanding and evolving EAs. These new approaches moved beyond just meeting legal obligations. Collaboration means cooperation between the EAO and Indigenous nations to achieve consensus on process decisions, complex issues of an EA or recommendations. This requires considerably more time and engagement with all parties without extending overall timelines. In our collaboration with Indigenous nations, the EAO committed to understanding the interests of Indigenous nations and finding ways to integrate those into the EA without compromising the EAO's obligations.

Table 1. Approaches to Enhanced Indigenous Engagement in Recent Environmental Assessments

Phase and Approach	Purposes
1. Collaboration agreements between the EAO and Indigenous nations	
<ul style="list-style-type: none"> Establishes government-to-government relationship between parties Establishes technical collaboration team to co-administer key portions of the EA and provide a venue for discussion and resolution of issues 	<ul style="list-style-type: none"> Recognizes the importance of supporting decision-making processes of both provincial and Indigenous decision-makers Seeks to achieve consensus on assessing project impacts on Indigenous nation's Aboriginal Interests

<ul style="list-style-type: none"> Escalating issue resolution process Collaborative drafting of the portion of the Assessment Report that contains assessment of project impacts on Aboriginal rights and title interests (Aboriginal Interests), conclusions and proposed EA certificate conditions 	<ul style="list-style-type: none"> Fosters a more productive, collaborative approach between the EAO, Indigenous nations, and proponents throughout the EA Enhances the Indigenous nations' participation and roles throughout the EA Conduct effective, transparent, and rigorous EAs that are responsive to the needs of Indigenous nations, and the statutory obligations of EAO, leading to the best possible information for decision makers
2. Collaboration between proponent and Indigenous nation	
<ul style="list-style-type: none"> Indigenous nation contributes to a portion of the proponent's application submitted to the EAO without edit Includes information on ethnography, language, governance, traditional knowledge, descriptions of title, rights and interests in relation to anticipated adverse project effects on Aboriginal Interests and suggested mitigation measures 	<ul style="list-style-type: none"> Enables the Indigenous nation to have full discretion over the approach, scope, content and writing of their contributions so that they accurately reflect their perspectives Enables information in the application to be presented in a manner consistent with the Indigenous nation worldview
3. Linked but separate provincial and Indigenous led assessment	
<ul style="list-style-type: none"> Coordinated parallel processes Indigenous nation analysis, conclusions and decision inform final provincial decision Tools to embed Indigenous nation project assessment process in the EA 	<ul style="list-style-type: none"> Supports informed decision making by both the Indigenous and provincial decision-makers Ensures that the Indigenous nation assessment, conducted in a manner consistent with its worldview, is directly considered in the provincial decision-making process
4. Independent Indigenous nation assessment	
<ul style="list-style-type: none"> Delivery of Indigenous process independent of provincial EA Consideration of Indigenous decision on project by Ministers' in their decision on whether to issue EA certificate 	<ul style="list-style-type: none"> Respects how an Indigenous nation has chosen to design its processes in relation to assessing the impacts of the project on its Aboriginal Interests

Focus on Collaboration Agreements between the Province and Indigenous Nations

Of the approaches described, the EAO has the most experience with collaboration agreements. The EAO's collaboration agreements have been based on the principles of mutual accountability, transparency and administrative fairness. These principles ensure information is freely shared and available, all parties are advancing informed decisions, and decision-makers consider a range of information but are not unduly influenced or fettered. These principles and deep engagement in collaborative EAs have fostered relationships built on trust and respect with Indigenous nations.

A focus of the EAO's collaboration has been on the assessment of the impacts of a proposed project on Indigenous nations' Aboriginal Interests. Assessing the impacts on Aboriginal Interests includes understanding the impacts for Indigenous nations' use of the land and resources, as well as the complex cultural and spiritual impacts specific to those Indigenous nations. These are often not measurable with western science. To ensure that Indigenous nations have a voice in the EAO's assessment, a unique approach was designed whereby Indigenous nations take on a role normally undertaken by the EAO - drafting key elements of the EA decision materials related to the impacts of the project on their Aboriginal Interests.

The most successful results from the EAO's collaboration with Indigenous nations have been consensus assessment conclusions including the impacts on Aboriginal Interests and the adequacy of accommodation to address those impacts. Where this has not been possible, the views of both the EAO and Indigenous nations were included in materials provided to provincial decision makers.

New Act: Implementing UNDRIP

The new act is one of the first pieces of legislation within Canada to concretely implement UNDRIP and embody government's reconciliation commitments. The new EA process provides legislated opportunities for co-designing and administering the process with Indigenous nations. It provides considerable space for Indigenous nations to define and incorporate their information needs and decision-making processes into EAs⁴.

The new process empowers Indigenous nations to freely determine how they engage in the EA process as defined in the act, ranging from collaborative to Indigenous-led EAs. Seeking consensus with Indigenous nations throughout the EA becomes an obligation of the EAO with options for Indigenous nations to conduct part of the assessment (e.g. the potential effects of the proposed project on the Indigenous nation) or conduct the entire assessment on behalf of the Province provided certain conditions are met (Indigenous-led assessments).

Respectful of their own Indigenous laws, traditions and right of self-determination, a key objective of the new EA process is to explicitly allow for and integrate any consent decision taken by an Indigenous nation on a proposed project. The new EA process is designed to ensure that any decision taken on the question of consent by an Indigenous nation is free, prior and informed.

The EAO will work together and seek consensus with Indigenous nations at a technical level throughout the entirety of the EA process, and there will also be key decision points where Indigenous nations may express their consent, lack of consent or abstain from deciding on behalf of their communities. It is hoped that in the majority of cases - by working together - it will be possible to reach consensus on major issues so that the decisions of Indigenous nations and the provincial decision makers align. A non-binding, optional dispute resolution mechanism may also assist in reaching consensus.

Conclusion

⁴ For more details see: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/free_prior_informed_consent_in_an_ea_context.pdf and page 8 of the Intentions Paper: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_intentions_paper.pdf.

In order for the EAO to ensure regulatory certainty and durable decisions, the EAO evolved from the legal duty to consult Indigenous nations as the standard practice, to developing a suite of collaborative approaches to enhance Indigenous nations' participation in EAs, to developing a new act that implements UNDRIP through concrete processes and mechanism to ultimately support reconciliation.

The EAO's development of collaborative approaches over the last few years, including collaboration agreements between the EAO and Indigenous nations, collaboration between proponents and Indigenous nations, separate but linked provincial and Indigenous assessments and independent Indigenous assessment, has contributed to the development of the new act. By changing how the Province works with Indigenous nations, EA decisions are more fully informed and durable, the Province's goal for reconciliation with Indigenous nations is supported, and the investment climate is strengthened

In fall 2019, the new act is expected to be brought into force. In the meantime, the EAO continues to work with Indigenous nations to identify Indigenous governance requirements in the form of informational inputs (key community values, assessment methodologies and existing information) and process inputs (Indigenous decision-making steps and protocols) that could inform the collaborative relationship with the EAO envisioned under the new act.