

# What's New? Rights and Legislative Change in Canada

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Trefor Smith, Senior Regulatory Advisory with The Firelight Group. Previous life a Sr Advisory with CEA Agency. A lot of my work over past 10 years is directly related to Indigenous Rights Impact Assessment in the context of major project assessments.

## The Promise of Change



In 2015, the federal government led by Justin Trudeau was elected on a platform of progressive change – with special commitment to advance reconciliation with Indigenous peoples and protect the environment. In 2017, a Social democratic-Green government was elected in British Columbia that included a very similar platform.

In 2019, new environmental assessment legislation within both jurisdictions is slated to be passed that would formalize the requirement to assess impacts to Aboriginal rights within the context of an EA. The legislative reforms aim to use the EA process to advance reconciliation with Indigenous peoples, including the implementation of the UN Declaration on the Rights of Indigenous Peoples (“the Declaration”).

I’m asking what steps are required to make a substantial change to the status quo, in light of existing challenges and limitations related to rights impact assessment (“RIA”) in EA processes.

Further, taking past and existing practices into consideration, together with newly proposed federal and provincial legislation, I ask what kind of implementation is required to transform existing practices into a fully-integrated rights-assessment process that advances reconciliation and the principles of the Declaration.

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Promises – Reconciliation, advancing the implementation of UNDRIP (FPIC), implementing the TRC's calls to action

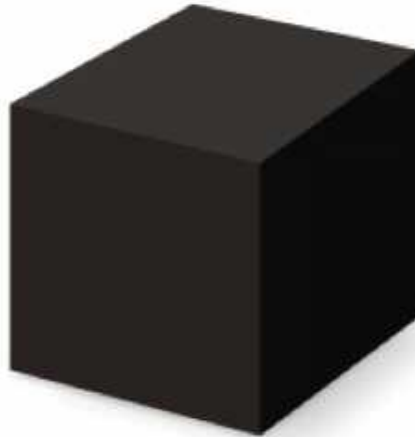
New legislation incorporates promise to include assessment of impacts to rights as a factor that must be considered as part of a major project assessment

BC EAA: Section 25 (Required assessment matters) (1) *The effects of a project on Indigenous nations and rights recognized and affirmed by section 35 of the Constitution Act, 1982 must be assessed in every assessment.*

IAA: 22 (1) *The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors... (c) 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;*

# Current conditions

## RIA is a black box



In Canada, rights impact assessment has emerged out of major decisions in Canadian Courts. When we are speaking about “rights” I am referring to “Aboriginal rights” that are defined within Canadian law

Current legislation does not require RIA within EA

No federal or provincial public-facing policy or guidance exists for RIA

However RIA is being done, in parallel with the EA process, but unlike components of the environment assessed under legislation, in the vast majority of cases no complete or transparent methodology is made available for RIA

Lack of transparency around methods means no one knows how it is being done, only that it is being done. On the outside, we are only getting general observations and high level conclusions that more often than not provide little transparency around how the effects assessment is being conducted.

In general, in comparison to other components of the environmental assessment, the part of RIA methodology that is required to reach to final characterizations of the severity of effects on rights is still a black box.

## How did we get here?



### 2. How did we get here?

- RIA stems from court decisions in 2004/05 – which caught governments by surprise and challenged all assumptions for business as usual, especially for major projects
  - So RIA evolved out of the court telling government that the Crown legal duty to consult and accommodate Indigenous peoples
  - And requiring the Crown to understand the “scope of rights” and the potential severity impacts posed by government decisions, including those related to Major Resource Projects
  - Where potential impacts were expected, governments now had to consult with impacted Indigenous Nations at a “depth” proportional to the potential severity of adverse impacts on Aboriginal or Treaty rights, and the relative strength of a Nation’s claim to rights. And where impacts were expected, the Crown was now legally obliged to ensure impacts Nations were accommodated (e.g., compensated) in a manner proportionate to the severity of impacts on Aboriginal or Treaty rights.
- Seeking the most efficient way of discharging its new legal obligations, governments at the time decided to hitch consultation/accommodation to existing EA processes

## Rights Impact Assessment is a different kind of animal



- **RIA is different than EA. It came from a different place**
- Over the past 10-12 years, federal and provincial environmental assessment (“EA”) processes in Canada and British Columbia have attempted to integrate the Crown’s legal duty to consult and accommodate into the EAs of major projects.
- But in the early years, the Crown took some time to adjust to the new legal context, and did not move towards establishing a consistent rights impact assessment methodology as part of its response to the new legal duty to consult and accommodate.
- In **initial response back in 2006-2009** to new legal obligations:
  - EA agencies ‘delegated’ as much of the legal duty to consult and accommodate as possible to project proponents
  - Risk of ensuring adequate “consultation and accommodation” was largely passed to the Proponent
  - Proponents developed IBAs that provided “benefits” in exchange for a FN’s release clause stating they were adequately consulted and accommodated . IBAs were an adaptive measure to new legal context that bought certainty for

Proponents.

- Govt assessment authorities only undertook RIA in cases of risk where First Nations opposed a project and residual adverse effects on First Nation rights were likely
- Govt assessment authorities **did not propose accommodation options that fell outside outside of EA toolbox**, i.e., avoidance, project re-design, mitigation and follow-up plans
- In event of residual effects that could not be avoided or mitigated, government implicitly expected Proponents to provide concrete accommodation measures through IBAs; or the project didn't proceed.
- Govt officials with limited resources likely may have asked themselves, ***Is there a need to undertake a detailed and transparent RIA if, at the end of the EA, any outstanding residual effects will be addressed through an IBA?***



Transparency: 99% of cases there is no transparent methodology provided



Currently –

Through challenges from Indigenous groups over the past decade, practice has evolved so that both EAO and CEAA incorporate some degree of RIA into their project-specific EA requirements and in final assessment reports. For example, by 2014, most federal EA Reports began including a section related to the assessment of impacts on Aboriginal or Treaty Rights.

However, between 2014 and 2019, most government RIA continued to be conducted without consistent methodologies, and without any of its methodological assumptions being transparent..

Additionally, over the past 5 years, some proponents started adding improvements to what before were only rudimentary and incomplete RIA into some BC EA Certificate Applications, in response to new government requirements.

However, as there remains no outward facing guidance and consulting firms are still struggling with understanding how to do RIA. In both provincial and federal EA, the quality is widely inconsistent and methodologies are different from EA to EA.

Conclusions of RIA are still frequently produce very curious and unlikely conclusions of no residual effects; or residual effects are found, they tend not to be well characterized, and government assessors tend to rely on "other processes" outside

the EA process, or IBAs to address the “problem” of accommodation for residual adverse effects on Indigenous rights.

For example, in a random survey of 20 federal EA reports published between 2012 and 2019, 13 of these reports included a direct reference to Proponent IBAs as a direct form of accommodation for impacts to rights, 6 other made reference to agreements in general, while one made reference to “economic benefits”. In cases where Proponent IBAs were cited as a form of accommodation, the EA had concluded that these accommodation measures would assist in addressing immitigable residual adverse effects on rights. For example, in the Rainy River EA Report, it is stated, “These agreements are expected to address any potential residual adverse impacts to potential or established Aboriginal or Treaty rights that may remain after the implementation of proposed mitigation measures.”

While these examples have not been fully explored, it suggests a pattern where for projects instances where residual effects on rights-based activities could not be mitigated, Proponent-Nation agreements were cited as the mechanisms for “cleaning up” remaining residual effects, before any attempt was made to characterize them. As is stated in the the Red Mountain Project EA report, , “Although the Agency is not involved in these confidential discussions, such agreements can be important in the context of accommodating impacts on Aboriginal or treaty rights.”

## Looking under the hood - Limitations under existing RIA approaches



In my experience over the past five years, although there have been some minor incremental improvements to how the CEA Agency and EAO have conducted RIA, the following issues remain:

Consideration of the **historical context**, which would include the characterization of current conditions and trajectories of change of rights-based activities against a historical baseline, is almost universally ignored;

**Indigenous-led assessments**, including baseline studies and project-VC interaction analysis, **ignored** or inadequately incorporated into the assessment;

**Collaborative rights impact analysis remains elusive** – the rare exception rather than a broadly accepted practice supported by government assessors and regulators;

Flawed methodologies for linking assessment of biophysical and social VCs into the RIA, i.e., **use of biophysical and non-Indigenous social/health indicators as “proxies”** for defining context for and effects on indigenous rights

**Undeveloped mitigation and offsetting measures** that have not been subjected to adequate risk evaluations are **characterized as highly effective** for eliminating residual effects

Multiple accounts analysis for alternative designs or locations of a project **do not**

**include Indigenous criteria, such as minimal impairment of indigenous rights;**

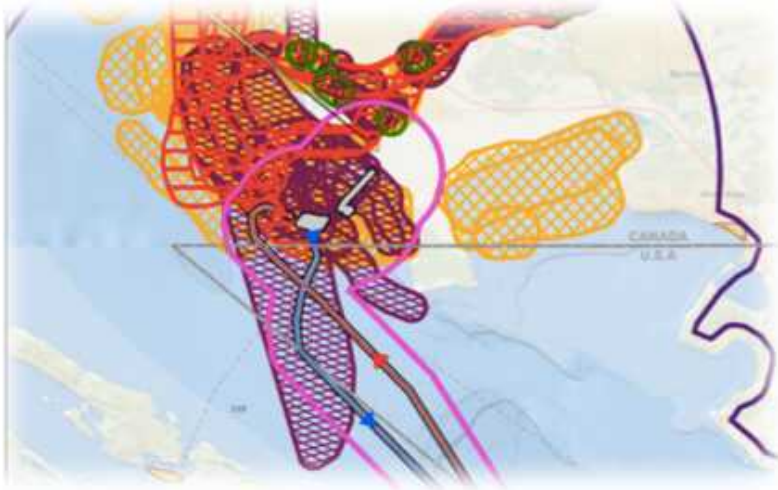
Impacts to cultural transmission, cultural landscape, cultural identity and sense of place are not assessed as a stand-alone right; proposed cultural mitigations are superficial and ineffective

AND – Although less so now, we still sometimes see proponents and the Crown arguing that there are no adverse effects because Nations can “go elsewhere” to practice their rights – completely ignoring the context of preferred locations and means for harvesting

These gaps and deficiencies in Proponent developed application are, in my experience, the norm rather than the exception and frequently get tacit approval from government assessment agencies who carry them over into their final EA conclusions.

In many cases, the findings of RIA studies commissioned by impacted indigenous Nations themselves are not meaningfully incorporated into the analysis of the Proponent – again often with the tacit approval government that lacks any policy or regulatory levers to require that Indigenous studies be meaningfully incorporated and considered.

For a large marine project proposed in an area of high-density use...



A stark example of problems that can arise when there isn't a rigorous and defensible RIA methodology put into place...

...the Proponent concluded 'No Residual Effects'.



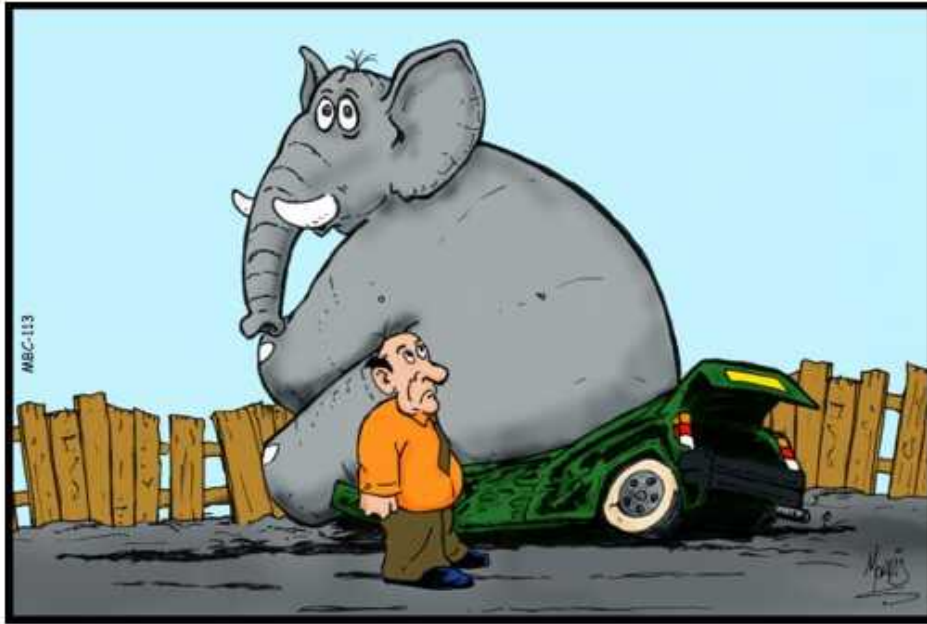
#### EXAMPLE OF MISTAKING ACCOMMODATION FOR MITIGATION: Roberts Bank Terminal 2 Project

The consultants for one Proponent actually treated its intention to engage in discussion with a First Nation about an IBA as **a form of environmental mitigation** that would 100% eliminate residual effects on the Nation's marine harvesting activities that were otherwise immitigable due to their being directly displacement by the roposed new 182 hectare infilled landform being created to serve as a new container terminal.

No cumulative effect was undertaken because of the conclusion that after mitigation there would be "no residual effects".

If there had been a form of rigorous policy and guidance in place prior to the Proponent undertaking its assessment, these methodological gaps would be less likely to occur.

No Residual Effects?



Rights impact assessment – At a turning point?





## Opportunity in emerging collaborative efforts between Crown and Indigenous governments



As we have heard during the past two days of presentations, there have been some recent emerging trends towards “collaboration” in assessment.

Also, through challenges from Indigenous groups over the past decade, practice has evolved so that both EAO and CEAA incorporate some degree of RIA into their project-specific EA requirements and in final assessment reports. **Yes, there has been improvement.** Governments have shown increasing willingness to collaborate and adapt their methodologies.

Why?

Partly a response to changes in legal and policy contexts (lost court cases)  
Partly an innovation to managing legal risk

Recent pilot projects that attempted “collaborative RIA” between government and Indigenous Nations - Examples:

BC EAO (Haisla, Kitimat LNG; Musqueam, George Massey Tunnel Replacement Project; CSFNs, Blackwater Gold Mine)  
CEAA (MCFN, Teck Frontier Project) – Collaborative assessment approach

**Outcomes of these pilot efforts have been mixed. Not all processes were considered to be effective or meaningful collaborations by participating**

**Nations.**

# Legislative Change

## Bill 51 - BC Environmental Assessment Act

## Bill C-69 – Impact Assessment Act

Promises of Change and Reconciliation: advancing the implementation of UNDRIP (FPIC); implementing the TRC's calls to action

**New legislation include assessment of impacts to rights as a factor that must be considered as part of a major project assessment**

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Change to something new or the status quo?

**Old wine in a new  
bottle...**

**or tasty new  
vintage?**

**NEW LEGISLATION HOLDS THE PROMISE  
OF CHANGE**

New legislation... but new ways of thinking and acting?

# IMPLEMENTATION IS EVERYTHING

## IMPLEMENTATION IS EVERYTHING

Will it result in a new approach or continuation with the status quo?

Will it result in formalized public-facing policy and guidance for RIA?

Why it's not a guarantee that by adding RIA to legislation would lead to public-facing policy and guidance

“Established practice” factors that could mitigate against rigorous public-facing policy and guidance on RIA:

- proponent-driven EA
- delegation of government responsibility for consultation and accommodation to Proponent
- Fear by Proponents and/or Governments that consistent and rigorous RIA methodology is too time-consuming, work-intensive or could increase frequency of findings of “severe” adverse effects on rights
- Proponent-Nation IBAs viewed as the standard form accommodation to address residual impacts to rights – “why fix it if it works”?

# Why it matters

## **Why does a public facing methodology for RIA matter?**

Before 2005, no legal requirement for governments to consider impact to rights.

Before 2019, no legal requirements for government to be transparent in their assessment of project impacts on Aboriginal and Treaty rights.

Measurable lack of vigour in RIA, but no public guidance to hold Proponents and/or governments accountable to an objective standard.

Flawed approaches in early RIA has – in most cases - underestimated the severity of impacts on on Aboriginal and Treaty rights.

Lack of public-facing standards or guidelines setting out a defined assessment methodology results in an inconsistent, overly discretionary approach between project assessments and between nations impacted by major projects.

Public-facing policy and guidance on RIA could help to improve accountability to a single set of guidelines and principles for undertaking RIA, and therefore support improved consistency in practice across EAs.

Very preliminary analysis suggests that under the current discretionary regime, the degree to which Indigenous Nation can successfully undertake their own analysis and

bring these findings into the EA will make a substantial difference as to degree to which RIA is considered in an EA (i.e., for that particular Nation). However, Indigenous Nations are almost entirely reliant on the goodwill of the Proponent to fund the Nation's own studies of potential impacts - there is no government policy or guidance that requires it.

The implications – an uneven playing field for Indigenous nations without existing capacity and access to resources and technical advisory services, and without knowledge that they are entitled to undertake assessments of project impacts to their rights.

**Recent court decisions have emphasized that meaningful consultation and accommodation requires a two-way dialogue about impacts to rights and proposed accommodation measures – not just “explaining”**

**If RIA is an essential part of identifying adequate mitigation and accommodation measures, a consistent application of RIA best practice across all projects and affected nation is critical to ensuring all Indigenous nations fair treatment within project assessment processes and a meaningful “dialogue” can occur regarding how impacts to rights are addressed.**

## OPTIONS



Pros and Cons

### **Change: Public-facing policy / guidance plus case-by-case assessment methodologies**

Pros: Provides clarity and certainty about what is expectations for minimal standard for RIA, and in most cases will raise the bar for RIA across all projects and for all impacted indigenous nations; Improves relationship between government and Indigenous Nations, builds trust, agreement on conclusions, fairness to all impacted nations; doesn't have to preclude development of tailored assessment processes during planning phases of an EA

Cons: Less flexible, risk of "one-size fits all" approach; more effort to develop case-by-case, tailored methodology

### **Status quo: No public-facing policy / guidance – Case by case assessment methodologies**

Pros: Flexibility, focused effort saved for small number of case-by-case methodologies; short-term savings proponents and governments

Cons: Communities without existing capacity may be excluded from



understanding potential project effects; inadequate mitigation or accommodation measures to address impacts on rights and culture; overly discretionary; transparent methodologies may only be developed in cases where legal action is threatened; may undermine trust; may result in greater risks to communities (unaddressed impacts) and greater legal risk to proponent projects; greater cost to all parties, potentially excluding Indigenous nations without resources/capacity to engage in collaborative drafting process

# THANK YOU

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